APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 616

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY and WARREN C. SCHWARTZ, Trustee in Bankruptcy of A & S ELECTRIC CORP.,

Petitioners,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1967
CERTIORARI GRANTED DECEMBER 4, 1967

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Docket Entries

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

In the Matter

of

A & S ELECTRIC CORP.,

Bankrupt,

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY and WARREN C. SCHWARTZ, Trustee in Bankruptcy of A & S ELECTRIC CORP.,

Appellants.

DATE	PROCEEDINGS
12-27-66	Filed record (original papers of District Court)
1-25-67	Filed brief and appendix, appellant
2- 3-67	Filed notice of appearances
2- 6-67	Filed supplemental record (original papers of District Court)
2-15-67	Filed notice of appearances
2-17-67	Filed reply brief, (U.S.A.)
4-11-67	Argument heard (by: Lumbard, ChJ., Smith & Feinberg, CJJ)

DATE	PROCEEDINGS
6-22-67	Judgment Affirmed, Lumbard, ChJ.
6-22-67	Filed judgment
7-11-67	Issued Mandate (opinion & judgment)
7-18-67	Original and supplemental record returned to District Court
7-25-67	Filed receipt of return of original and supplemental record to District Court
7-26-67	Certified appendices and proceedings to Harold Stern
9-15-67	Filed notice of filing of petition for writ of certiorari

Relevant Docket Entries

(pp. A-C)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

In the Matter

of

A & S ELECTRIC CORP.,

Bankrupt.

Date	Proceedings
5/25/66	Referee's Certificate on Review of order dated April 25, 1966 filed. Returnable June 8, 1966 at 10:00 A.M.
6/ 8/66	Before Rosling, J.—Hearing on petition for review, etc. Motion argued. Decision Reserved.
9/22/66	Decision by Rosling, J.
11/ 4/66	Order filed by Rosling, J.
11/17/66	Notice of Appeal filed.
11/17/66	Undertaking for Costs on Appeal filed. (Fid. & Dep. Co. of Md.)

Judgment of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of June one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD,

Chief Judge,

HON. J. JOSEPH SMITH,

HON. WILFRED FEINBERG,

Circuit Judges.

In the Matter of

A & S ELECTRIC CORP.,

Bankrupt,

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY and WARREN C. SCHWARTZ, Trustee in Bankruptcy of A & S ELECTRIC CORP.,

Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 355—September Term, 1966.

(Argued April 11, 1967 Decided June 22, 1967.)

Docket No. 30992

In the Matter

of

A & S ELECTRIC CORP.,

Bankrupt,

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY and WARREN C. SCHWARTZ, Trustee in Bankruptcy of A & S ELECTRIC CORP.,

Appellants.

Before:

LUMBARD, *Chief Judge,*
SMITH and FEINBERG, *Circuit Judges.*

Appeal from an order in the Chapter XI proceeding of A & S Electric Corp., in the Eastern District of New York, George Rosling, *J.*, denying wage priority status to a claim for unpaid contributions to an Annuity Plan.

Affirmed.

WARREN C. SCHWARTZ, Brooklyn, New York, *Trustee in Bankruptcy for A & S Electric Corp.*

HAROLD STERN, New York, N. Y. (Norman Rothfeld, New York, N. Y., on the brief), *for Joint Industry Board of the Electrical Industry, appellant.*

HOWARD M. KOFF, Department of Justice, Washington, D. C. (Richard C. Pugh, Acting Assistant Attorney General, Lee A. Jackson and Joseph Kovner, Department of Justice, Washington, D. C., and Joseph P. Hoey, United States Attorney for the Eastern District of New York, Brooklyn, New York, and Frank R. Natoli, Assistant United States Attorney, Brooklyn, New York, on the brief), *for the United States.*

LUMBARD, *Chief Judge*:

The Joint Industry Board of the Electrical Industry, which administers an Annuity Plan funded by employer contributions under a collective bargaining agreement between Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, and four associations of electrical contractors in New York City, appeals from an order of Judge Rosling, affirming an order of Referee Warner in the Chapter XI proceeding of A & S Electric Corp. in the Eastern District of New York, denying priority status as "wages . . . due to workmen" under section 64a(2) of the Bankruptcy Act, 70 Stat 725 (1956), 11 U. S. C. § 104a(2), to the Joint Industry Board's claim for

unpaid contributions of $5114 to the Annuity Plan. We agree with Judge Rosling that this claim must be denied a wage priority under the Supreme Court's decision in *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29 (1959), and we affirm his order.

The Annuity Plan of the Electrical Industry, as amended to July 1, 1964, requires each employer of workers represented by Local Union No. 3 to contribute $4.00 for each day's wages paid to each such worker. Each worker for whom such contributions are made becomes a Participant in the Plan, and he or his designated beneficiary is entitled to receive monthly payments of specified amounts, until the sums credited to his account are exhausted, upon his death, retirement from the industry at age sixty or over, permanent disability after working more than ten years for a contributing employer, or ceasing to be a Participant for any other reason. In addition, the beneficiary of a deceased Participant is entitled to death benefits out of the income of the Plan, if available, the amount varying with the length of his continuous participation in the Plan. The benefits payable under the Plan are expressly made non-assignable, and immune from attachment, garnishment, or other process. The trustees are authorized to invest and reinvest the funds of the Plan "in their sole discretion," and are made liable only for losses "due to their wilful misconduct or fraud."

Like the welfare fund contributions which the Supreme Court denied a wage priority in *United States* v. *Embassy Restaurant, Inc., supra,* contributions to the Annuity Plan "are not 'due to workmen,' nor have they the customary attributes of wages." 359 U. S. at 33. The contributions in *Embassy Restaurant* were "flat sums of $8 per month for each workman . . . without relation to his hours, wages

or productivity," 359 U. S. at 32; contributions to the Annuity Plan are likewise at a flat rate of $4.00 for each day's wages. Moreover, as in *Embassy Restaurant*, the contributions are payable directly to the trustees of the Annuity Plan, who are vested with exclusive management of its funds; so far as the record shows, "a workman cannot even compel payment by a defaulting employer." 359 U. S. at 32; cf. *Local 140 Security Fund* v. *Hack*, 242 F. 2d 375 (2 Cir.), cert. denied, 355 U. S. 833 (1957).

The Court also observed in *Embassy Restaurant* that the congressional purpose in enacting the wage priority was "to provide the workman a 'protective cushion' against the economic displacement caused by his employer's bankruptcy," and that the welfare fund contributions, which were applied to life insurance, sick benefits, and hospital and surgical plans,

> "offer no support to the workman in periods of financial distress. Furthermore, if the claims of the trustees are to be treated on a par with wages, in a case where the employer's assets are insufficient to pay all in the second priority, the workman will have to share with the welfare plan, thus reducing his own recovery." 359 U. S. at 33-34.

The Joint Industry Board argues that the Annuity Plan does offer support to its Participants in periods of financial distress, because a worker who permanently ceases to be employed in the electrical industry ceases to be a Participant and is entitled to fixed monthly benefits. However, all indications are that relatively few workers whose employer becomes bankrupt will permanently leave the electrical industry. Moreover, the monthly benefits paid to a worker withdrawing from the electrical industry are fixed

at $50.00 or (for workers leaving after January 1, 1965) $60.00 a month. Thus allowing a wage priority to Annuity Plan contributions might well reduce the amount of unpaid wages a worker could realize from bankruptcy, and would not increase the amount of benefits immediately payable under the Plan unless his account with the Plan was empty. The Annuity Plan therefore does not afford a meaningful "protective cushion" against the economic dislocation caused by an employer's bankruptcy, and cannot be accorded a wage priority under *Embassy Restaurant.*[1]

It has been forcefully argued that contributions to funds like the Annuity Plan should receive a wage priority in bankruptcy. See, e.g., *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29, 35 (1959) (Black, *J.*, dissenting); Note, Union Retirement and Welfare Plans; Employer Contributions as "Wages" Under Section 64a(2) of the Bankruptcy Act, 66 Yale L. J. 449, 460-61 (1957). But in light of the Supreme Court's decision in *Embassy Restaurant,* such an argument must be made to Congress, not to this court.

Affirmed.

(1505)

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[1] The Joint Industry Board also relies on *Sulmeyer* v. *Southern California Pipe Trades Trust Fund,* 301 F. 2d 768 (9 Cir. 1962), which granted a wage priority to contributions to a Vacation and Holiday Benefit Fund. But that decision is clearly distinguishable in any event, as it rested on the facts that vacation pay had already been held entitled to a wage priority, see, e.g., *United States* v. *Munro-Van Helms Co., Inc.*, 243 F. 2d 10 (5 Cir. 1957), that taxes were withheld from employees on contributions to the Fund, and that the Fund established a separate savings account for each employee.

Order of the United States District Court Dated November 4, 1966

(R. p. 1)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

THE JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY having heretofore filed its petition for review of the order of Hon. Sherman D. Warner, Referee in Bankruptcy, dated April 25, 1966; and, said petition for review having come on for hearing on the 8th day of June, 1966, before Hon. George Rosling, Judge of the United States District Court for the Eastern District of New York, and Harold Stern, Esq., by Norman Rothfeld, Esq., attorneys for the Joint Industry Board of the Electrical Industry, the petitioner and objectant herein, and Schwartz and Duberstein, Esqs., attorneys for the trustee, having appeared in support of said petition, and Joseph P. Hoey, United States Attorney for the Eastern District of New York, by Steve C. Arniotes, Assistant United States Attorney, attorney for the United States of America, having appeared in opposition thereto, and the said Court having rendered a decision wherein the findings of fact and conclusions of law of the said Referee be affirmed,

Now, on motion of Joseph P. Hoey, United States Attorney for the Eastern District of New York, attorney for the United States of America, it is

ORDERED, that the said order is hereby confirmed.

Dated: Brooklyn, N. Y.,
November 4, 1966.

GEORGE ROSLING,
U.S.D.J.

Opinion and Decision of United States District Court Hon. George Rosling, *Judge*

(R. pp. 2-11)

Order of Referee in Bankruptcy made April 25, 1966, certified for review on petition of the Joint Industry Board of Electrical Industry Local No. 3 (hereinafter the "Joint Board"), claiming to be a preferred creditor for wages owing to certain of the local's members is confirmed. The facts are not in dispute, having been stipulated to by the Joint Board and the trustee in bankruptcy. The issue is tendered by the opposition of the United States to recognition of the priority asserted by the petitioner for review.[1]

The proof of claim was filed by the Joint Board in its own right, as a direct creditor of the bankrupt for unpaid contributions due to a Welfare Fund of which the Joint Board pursuant to a collective bargaining agreement between the local and the bankrupt as employer of the local's members was the trusteed administrator. These employee-members were the beneficiaries of the funded contributions entitled themselves to receive, or to have transmitted to

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[1] Wage claims are accorded second tier priority by Bankruptcy Act (the "Act") § 64a(2), 11 U.S.C. § 104a(2), and taxes legally due to the United States—(the Government's claim here is for unpaid Internal Revenue taxes owing by the bankrupt and by the debtor in possession under Chapter XI prior to adjudication)—owing by the bankrupt a lesser fourth rank priority (ibid. (a)4). The pertinent language of the provision is as follows: § 64. "Debts Which Have Priority (a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be * * * (2) wages not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, * * * ; (4) taxes legally due and owing by the bankrupt to the United States * * * ."

their nominees, a variety of benefits the nature of which depended on which of divers alternative contingencies supervened.

The employees affected did not file direct claims herein as creditors,[2] nor assignments of such claims to the Joint Board with power of attorney to act for them, nor did the claim as filed declare it was vicarious in behalf of such individual workers the filing of which was duly authorized by them.[3]

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[2] The Joint Board's procedure in this regard, it is fairly inferable, was deliberate and not the result of oversight. The first disclosure in the papers certified by the Referee of the names of the employees concerned and the amount of the "annuity" referable to each of them appear in a memorandum of law filed with the Referee by the attorney for the Joint Board in its behalf in support of the alleged second priority. The total of the annuities scheduled is $5,114, the sum of the defaulted contributions.

[3] See the following relevant provisions:

Act § 57d (11 U.S.C. § 93d), as to proof and allowance of unliquidated or contingent claim; id. subd. i, as to proof of a claim when a creditor whose claim against a bankrupt estate is secured in whole or in part by the individual undertaking of a person fails to prove and file his claim. The "person" furnishing the undertaking is subrogated to the rights of the non-filing creditor and may himself file, but with qualified right only to participate in dividends.

Id. subd. n, as to limitations for filing.

See also Act § 63a, proof of debts "founded upon * * * (8) contingent debts and contingent contractual liabilities;" and General Order 21 as to proofs of claim, passim, and specifically in subd. (1), as to the formal requirements of proof filed by an "agent"; subd. (3), regulations affecting claims assigned after the commencement of the proceedings, but before proof of claim has been filed; and subd. (5) with respect to the execution of a power of attorney to represent a creditor or assignment of claim after proof.

The relevancy of the foregoing rests upon the ambiguous status the Joint Board occupies as claimant, in that if the claim is for wages the Joint Board is not a direct creditor of the bankrupt for the liquidated total of unpaid contributions, but it would necessarily be an agent or assignee filing vicariously in behalf of the participant employees. Its claim would be for the total of the

This is not surprising when it is considered that the fund administered by the Joint Board with respect to the entire industry runs into enormous figures.[4] Manifesting a prudent foresight, the draftsmen of the Annuity Plan provided in subd. (c) of its 9th section that

> "No person claiming by or through any Participant by reason of having been named as beneficiary in a certificate, or otherwise, nor any contributing Employer, nor the Union, or any other person, partnership, corporation or association shall have any right, title or interest in or to the Annuity Fund or any part

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unpaid contributions, to be deemed, in order to qualify for the wage preference, a part of the "wages" of the workers which they have transferred to the Joint Board or the value ("estimated" under § 57d) of the worker's wage interest in the contributions actuarially computed as of the date of the commencement of the Chapter XI bankruptcy proceeding.

This decision necessarily turns on a construction which subsumes within the category of "wages" only that which by statute, narrowly construed, is denominated such, to wit, money due and currently payable as compensation to workmen for their toil, or which by judicial gloss is held included, e.g. vacation credits. Wages, moreover, to qualify as such must be payable to the worker unconditionally and with promptitude after the services to be compensated by the payment are rendered. Resolution of collateral complexities generated by contrived arrangements intended for special objectives so as to give to a transaction the appearance of a wage payment, but wherein the substantial attributes of wages are lacking, is superfluous. What is here due and claimed is manifestly an obligation that is related to compensation for a wage earner's services. It does not, however, satisfy the statutory and judicially expanded definition of wages in the sense of employer to employee payments entitled to a second tier priority.

[4] The attorney for the Joint Board declares in his affidavit in support of the petition for review that "[s]ince the Annuity Fund commenced operations in 1954 it collected credits for annuitants in the sum of $110,990,345 and paid out to Participants and their beneficiaries the sum of $26,657,642; the total net credits are $84,332,703."

thereof. Under no circumstances shall any amount contributed by the Employers revert to them, or any of them."

The exclusory thrust of the provision is clear. It would have been unwise for the Joint Board to have risked diluting its clarity by urging before the Referee as a ground in support of its claim for the $5,114 now at issue a direct participatory interest, legally maintainable, by the beneficiaries in the corpus of the Annuity Fund. It is this gingerly approach to the tripartite employer-Joint Board-employee relationship to the trust fund corpus and the concomitant employer-employee relationship to the wages payable that puts the monies contributed to the fund beyond the periphery of what the statute as judicially construed delimits as § 64a(2) wages.

United States v. Embassy Restaurant, Inc., 359 U. S. 29, 33-34, 79 S. Ct. 554, 557 (1959), in unambiguous language embodies the rule in the following words. The Bankruptcy Act, the opinion notes,

> "fixes the relative priority of claims of classes of creditors. Here that class is 'wages * * * due to workmen.'
>
> "The contributions here are not 'due to workmen,' nor have they the customary attributes of wages. Thus, they cannot be treated as being within the clear, unequivocal language of 'wages * * * due to workmen' unless it is clear that they satisfy the purpose for which Congress established the priority. That purpose was to provide the workman a 'protective cushion' against the economic displacement caused by his employer's bankruptcy. These payments owed as they are to the

trustee rather than to the workman, offer no support to the workman in periods of financial distress. Furthermore the claims of the trustees are to be treated on a par with wages, in a case where the employer's assets are insufficient to pay all in the second priority, the workman will have to share with the welfare plan, thus reducing his own recovery. * * * [T]he obligation to make contributions, when incurred, was to the trustees, not to the workmen. The debt was never owed the workmen. Furthermore, assignability of wage claims as in Shropshire,[5] may benefit the bankrupt's employees, who are thus enabled to obtain money sooner than they might by waiting out the bankruptcy procedure."

In summation Embassy commented (359 U.S. at p. 35):

"Under the Bankruptcy Act, however, not all claims 'justly due' have priority. They must be within a class, such as 'wages * * * due to workmen.' [asterisks in original] The claims here are not. If this class is to be so enlarged, it must be done by the Congress."[6]

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[5] Shropshire, Woodliff & Co. v. Bush, 204 U.S. 186, 27 S. Ct. 178 (1907).

[6] See also: Local 140 Security Fund v. Hack, 242 F.2d 375 (2d Cir. 1957), cert. denied 355 U.S. 833; Matter of Brassel, 135 F. Supp. 827 (N.D.N.Y. 1955); Los Angeles Hotel-Restaurant Employer-Union Welfare Fund v. Bowie, 283 F.2d 516 (9th Cir. 1960), cert. denied 365 U.S. 817. Sulmeyer v. Southern California Pipe Trades Trust Fund, 301 F.2d 768 (9th Cir. 1960) is distinguishable. It deals with vacation pay which although funded by trustees, was made available to the participating employee through a right of withdrawal during the year for the stated purpose of the accumulation. Additionally, the employer contributions to the earmarked fund were so closely assimilated to the wage concept that the employer perforce withheld with respect to the employee-beneficiary the employee's personal income tax, social security and un-

The benefits which the contributions here stipulated purchase for the worker are comprised in paragraph 7, and the disposition of the fund on termination, in paragraph 8, of the annuity plan. An admirable summary of these provisions, which need not here be repeated, is set out at pages 4 through 9 of the Referee's decision under review. The plan would appear to provide that in one sense or another the worker or his designees would get back in full the contributions for his account made at the rate "of Four ($4.00) Dollars per day for each day worked by each employee who is a Participant of this Annuity Plan," (Annuity Plan § 6(a)), and which "shall be credited to the individual account of each Participant but shall be payable to him only as hereinafter [in § 7] provided." (§ 6(b)).

That the benefits have present, as well as maturity, value, and were in a real sense purchased by an aliquot fraction of the labor of the worker through the employer contributions remitted to the Joint Board cannot be gainsaid. To argue, however, that such circumstance equates what is paid by the employer and received by the Joint Board with "wages * * * due to workman," words of art under the Bankruptcy Act, is to follow the reasoning of the opinion of the dissenting minority in Embassy. Therein Justice Black had urged the Court, and failed to persuade it to his view, that the history, as he read it, of the priority

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employment compensation deductions. [S]uch deductions" Sulmeyer notes, p. 771, "are indicia of wages." In the instant situation the welfare contributions are so far insulated from the status of wages that no such deductions were, or were required, to be made from the wages of the employees on account of the contributions, and income taxes were payable thereon by the worker only when he received payments under the plan. (See: IRC 72(a)(d)(1); 402(a)(1); 403(a)(1); 404(a)(2); 3121(a)(5)B; 3306(b)(5)B; 3401(a)(12)B.)

section should warn "against niggardly interpretations of the language," that it was hard for the distinguished jurist to see how the payments "could not be 'wages'." They "are certainly not gifts." (359 U.S. at p. 37) With considerable force he comments that

> "It cannot be argued that a sum paid by an employer for a worker's services loses its status as wages merely because it is used to purchase insurance benefits. For the Bankruptcy Act has as yet authorized no investigation of how a worker spends his money to determine if he is entitled to priority for it. * * * It is also hard for me to imagine how the fact that the moneys are paid to parties other than the workmen is in any way connected with the question of whether payments are wages, whatever its relevance might be whether the sums are due to 'workmen'." (id. at p. 38)

Pointing to the Government's concession "that if a formal assignment had been made here, wage status might be granted" the Justice, after some discussion of such postulated situation not present in Embassy, states his view "finally" that

> "it seems to me undesirable to make a distinction in this area between payments on assignment and payments in trust. At best it would let the carrying out of congressional policy depend on the skill with which unions prepare legal documents, and on the various state laws covering the validity of wage assignments. At worst it would give priorities to assignees of the workmen, usually creditors, while denying them to insurance funds for their benefit. * * * [T]he sums which Embassy contracted to pay to these

employees for their labor by making payments to welfare funds are wages due to workers." (id. at p. 40)

With the dissenters' gloss thus focusing upon the area of divergence from the majority's holding, it is clear that the force of the prevailing determination cannot be evaded or attenuated by seizing upon the adventitious and the accidental in the Court's opinion. One cannot, through a real or fancied meeting of the requirements implicit in some textual obiter, uttered, but not stressed as critical, contrive a bundle of distinctions whereby a contribution to a welfare fund may, Embassy notwithstanding, approximate in its attributes a payment of wages due to a workman so as to qualify it for the second priority. The contribution remains a contribution, and does not assume the status of wages.

If what is unquestionably a contribution to a welfare fund in which qua fund the worker has no present interest, but from which he or his distributees may ultimately derive a benefit, is, nevertheless, to be denominated wages within the purview of § 64a(2), Embassy must either be overruled or now reread in a Pickwickian sense. For this Court to do so is to legislate a preference, a function beyond its competence and concern.

Settle order on notice.

GEORGE ROSLING,
U. S. D. J.

Order of Referee

(R. pp. 12-13)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

At Jamaica, New York, in said District,
on the 25 day of April, 1966.

UPON the annexed stipulation by and between Schwartz & Duberstein, Esqs., attorneys for the Trustee, and Harold Stern, Esq., attorney for the Joint Industry Board of the Electrical Industry, Local #3, dated June 14, 1965, and Claim No. 4 of the Joint Industry Board of the Electrical Industry, Local #3, in the sum of $10,537.34 on file herein, and all proceedings heretofore had herein, it is

On motion of Schwartz, Duberstein, Esqs., attorneys for the Trustee,

ORDERED, that that portion of the claim representing funds payable by the bankrupt into Union Annuity Funds in the sum of $5,114.00 for which priority was asserted, is to be allowed as a general claim without priority, and it is further

ORDERED, that the portion of the claim representing deductions from payroll in the sum of $510.00 for which

priority was asserted, is to be allowed as a priority claim, and it is further

ORDERED, that the portion of the claim representing vacation expense account in the sum of $1,624.53 for which priority was asserted, is to be allowed as a general unsecured claim, and it is further

ORDERED, that the remainder of the claim representing Pension, Hospitalization and benefits in the sum of $2,030.66, cost of administration funds in the sum of $304.60, 1% of payroll from Local Employees Benefit Board in the sum of $572.72, and disability contributions benefits plan in the sum of $380.83, are to be allowed as general unsecured claims, and it is further

ORDERED, that the funds hereinabove set forth entitled to priority amount to $510.00, and said claim No. 4 is to be allowed as a priority claim for said sum of $510.00, and it is further

ORDERED, that the balance of the aforesaid claim amounting to $10,027.34 is to be allowed as a general claim.

SHERMAN D. WARNER,
Referee in Bankruptcy.

Opinion and Decision of Referee

(R. pp. 16-30)

The Joint Industry Board of the Electrical Industry, an unincorporated association, has filed its proof of claim, No. 4, in this proceeding for an indebtedness in a total amount of $10,537.34. That total sum includes $5,114.00 which the debtor has failed to pay claimant pursuant to Annuity Plan of the Electrical Industry Agreement of December 11, 1957 and represents the total of $4.00 per day contributions for each day worked by each employee who is a participant of the Annuity Plan, which plan is alleged to be a part of the debtor's collective bargaining agreement.

The balance of the claim which the debtor allegedly has failed to pay to the claimant consists of several total amounts in as many categories which are alleged to have been required according to said collective bargaining agreement.

This decision has to do with only that part of said claim which is alleged to constitute a priority wage claim $5,114.00.

On January 9, 1963 the bankrupt filed its petition under Chapter XI, Section 322, for an arrangement and was adjudicated on November 6, 1963. The trustee having qualified; his attorney and the attorney for the Joint Industry Board of the Electrical Industry, Local #3, stipulated on June 14, 1965 how each of the several amounts of the claim would be allowed and agreed to allow that portion of the claim representing funds payable by the bankrupt into Union Annuity Funds in the sum of $5,114.00 as a priority wage claim.

On or about August 5, 1965, the stipulation, together with a proposed order to approve it, was submitted for signature and entry. This Referee believing the stipulation insofar as it allowed the $5,114.00 portion of the claim as a priority contravened the provisions of Section 64a(2) of the Bankruptcy Act, requested and received from the respective attorneys memoranda of law on the right to priority of that portion of the claim. At a later date a memorandum was received from the United States Attorney for this district in opposition to the priority status for said $5,114.00.

The balance of the stipulation which determines the priority or non-priority status of the remaining items is not questioned.

Section 64a(2) provides in part:

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be . . . (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; . . ."

Facts

According to the uncontroverted allegations in the proof of claims, the consideration for the $5,114.00 debt is alleged as follows:

> "The Debtor operated under a collective bargaining agreement with Local Union No. 3, International

Brotherhood of Electrical Workers, AFL-CIO. By the terms of this agreement the Debtor was required to contribute to, and the claimant was empowered and required to administer, various Trust Funds established for the welfare of the employees of the Debtor. The Debtor has failed to make certain required payments for the above described funds during the three months prior to the filing of its petition. The Annuity Plan of the Electrical Industry incorporated as part of the Debtor's collective bargaining agreement in Article II, Section 1 (e) thereof, provides as follows:

'(a) Beginning with the first payroll week after January 1, 1954, and every week thereafter up to December 31, 1957, and for the duration of any renewal or extension of the collective bargaining agreement between the Employer and the Union, each electrical contractor shall pay into the Annuity Fund the sum of Four ($4.00) Dollars per day for each day worked by each employee who is a Participant of this Annuity Plan.

'(b) The aforesaid Employer contributions under paragraph (a) hereof shall be credited to the individual account of each Participant but shall be payable to him only as hereinafter provided.

'(c) Such contributions shall be forwarded weekly to the Trustees within one (1) week after each payroll period.'

"The Debtor has failed to pay over to claimant this $4.00 per day contribution in the amount of $5,114.00. This sum constitutes priority wage claim because these

monies are held by claimant for the individual accounts of the employees of the Debtor."

The attorney for claimant has not submitted the collective bargaining agreement for consideration by the Court, but he has submitted the Annuity Plan of the Electrical Industry Agreement (hereinafter referred to as the Annuity Plan) entered into and adopted at New York City the 11th day of December 1957, by and between the New York Electrical Contractors' Association, Inc., The Master Electrical Contractors' Association, Inc., the Greater City Electrical Contractors Association, Inc. and the Association of Electrical Contractors, Inc., each an employers trade association, having its principal place of business located in the City of New York, representing the employers in the electrical contracting industry, hereinafter jointly referred to as the "Employer" or the "Employer Association" and Local Union No. 3 of the International Brotherhood of Electrical Workers, AFL-CIO, hereinafter referred to as the "Union".

The above quoted provisions from Article II, Sec. 1(3) of the debtor's collective bargaining agreement repeats verbatim paragraphs (a), (b) and (c) of Sec. 6 of the Annuity Plan:

6. "EMPLOYER CONTRIBUTIONS: All contributions shall be determined as follows:

(a) Beginning with the first payroll week after January 1, 1954, and every week thereafter up to December 31, 1957, and for the duration of any renewal or extension of the collective bargaining agreement between the Employer and the Union, each electrical contractor shall pay into the Annuity Fund the

sum of Four ($4.00) Dollars per day for each day worked by each employee who is a Participant of this Annuity Plan.

(b) The aforesaid Employer contributions under paragraph (a) hereof shall be credited to the individual account of each Participant but shall be payable to him only as hereinafter provided.

(c) Such contributions shall be forwarded weekly to the Trustees within one (1) week after each payroll period."

(See page 9, Sec. 6 of the Annuity Plan booklet, 1959 edition in silver cover, referred to as Booklet.)

Sections 4 and 5 of the Annuity Plan, page 8 of Booklet define:

4. *Participants*: Each employee of each contributing Employer who is employed within the bargaining unit included in the collective bargaining agreement between the Union and the Employer shall be eligible to participate in this Annuity Plan and shall be a Participant."

5. "*Contributing Employers*: The parties intend that this Annuity Plan and the obligations to make contributions hereunder shall apply uniformly to every electrical contractor who is now a member of the Employer Association or who may hereafter join it and to every electrical contractor (whether or not a member of the Employer Association) who may now or hereafter employ persons within the bargaining unit. It is and it shall continue to be a condition precedent to the liability of any electrical contractor to make

contributions hereunder, that the Union will have and maintain at all times agreements requiring identical contributions from all Employers of persons within the bargaining unit and providing similar benefits for such persons."

The benefits under the Annuity Plan are set forth in Section 7 which is divided into twelve (12) paragraphs defining and limiting the conditions under which the participant employee shall be entitled to receive benefits under the plan. Paragraph (a)(1) is inapplicable because it provides for the payment of the sum of $1,000.00 as a death benefit to employee's designated beneficiary should participant die between January 1, 1954 and December 31, 1954. The payment may be made either in a lump sum or in monthly installments of $100.00 each, as the Trustees in their sole discretion may determine.

Paragraph (a)(2) seems inapplicable because it provides that any Participant covered by this Annuity Plan prior to January 1, 1956 who should die on and after January 1, 1955, and on or before December 31, 1957, both dates inclusive, then his designated beneficiary shall be paid the sum of $2,000.00 as a death benefit, either in a lump sum or in monthly installments of $100.00 each, as the Trustees in their sole discretion may determine.

Paragraph (a)(3) provides that a Participant who did not become such until after January 1, 1956, and died after he had one year's continuous participation in the Annuity Plan, then his designated beneficiary shall be paid the sum of $1,000.00 as a death benefit, and should such Participant die after two years' continuous participation his designated beneficiary shall be paid the sum of $2,000.00 as a death benefit, either in a lump sum or in monthly install-

ments of $100.00 each, as the Trustees in their sole discretion may determine.

Paragraph (b) requires payment to the beneficiary of all monies credited to the account of the Participant, in addition to the above benefits. Obviously the benefits payable under these four paragraphs have no relation to the amount of contributions made under the Annuity Plan and such contributions cannot be equated to wages.

Paragraph (b) sets forth the first provision for the payment to the beneficiary of the contributions credited to the account of the Participant, but they are not paid as wages or as an assignment of wages by the employee.

Subdivision (c), Section 7, is divided into three paragraphs including a schedule of payments to a participant who should retire from the industry at the age of sixty (60) or over.

Paragraph (c)(1) provides that if participant retires prior to April 1, 1959 he shall receive $50.00 per month until the monies credited to his account are exhausted. If he retires after April 1, 1959, he shall be entitled to receive $75.00 per month until said monies credited to his account are exhausted.

Paragraph (c)(2) provides that a retired Participant who dies while receiving a pension and before he has exhausted his account, then the balance accumulated shall be paid to his designated beenficiary in monthly installments of $100.00 each, or in a lump sum as the Trustees may decide. In addition, upon such death the Annuity Plan shall pay to the designated beneficiary death benefits in accordance with the table as set forth in said section:

$200. for one year's continuous participation
$300. for up to and including two years continuous participation

$400. for up to and including three years continuous participation

$500. for up to and including four years continuous participation

$600. for up to and including five years continuous participation

$700. for up to and including six years continuous participation

$800. for up to and including seven years continuous participation

$900. for up to and including eight years continuous participation,

and $1,000. for more than eight years continuous participation in monthly installments of $100. each, or in a lump sum as the Trustees may decide. These death benefit payments set forth above shall be retroactive without regard to the date of death of the participant.

Thus under subdivision (c) of Sec. 7, where an annuitant dies after he has retired, but before exhausting the contributions credited to his account, his designated beneficiary receives in addition to the remaining accumulated balance of contributions, the death benefits set forth in the schedule. So that in this event, the payments are not equated to wages.

Paragraph (3) of subdivision (c) covers the event when a retired participant returns to the employ of the contributing employer and it deems him to be a new participant as of the date of his return to employment, and it limits his maximum death benefits as provided in Par. 7(a)(3) and provides that should he die before he becomes entitled to the maximum death benefit, his beneficiary shall receive a

sum not to exceed the amount of death benefit as provided in the above mentioned paragraph, nor less than the amount set forth in paragraph 7(c)(2) of the Annuity Plan.

This is also a provision that is not related to or equated to wages.

Subdivision (d) of Sec. 7, is divided into two paragraphs. (1) limits payments to Participants to $50.00 per month until the monies credited to his account have been exhausted in the event that Participant becomes permanently disabled, ceases to be a Participant, or enters the Armed Forces of the United States, when he shall cease to be covered under this Plan. (2) provides for the event that if such former participant should die before he has exhausted his account then the balance accumulated shall be paid to his beneficiary in monthly installments of $100.00 each, or in a lump sum, as the Trustees may decide.

Section 8 covers the termination of the Plan and it may be stated generally, that it may be terminated when there is no longer in force an agreement between the Employer and the Union requiring Employer contributions to said Annuity Fund, in which event the Trustee shall apply the fund to pay or provide for the payment of any and all obligations of the said Trust and distribute and apply any remaining surplus in such manner as will best effectuate the purpose of said Trust; provided that no part of the corpus or income of said Trust shall be used for or diverted to purposes other than the exclusive benefit of the Participants, or the administrative expenses of the Annuity Fund or for other payments in accordance with the provisions of the Annuity Plan.

Here again the distribution to be made by the Trustees on termination has no semblance to wages.

Under Section 9—*General Provisions,* paragraph (c) provides as follows:

> "No person claiming by or through any Participant by reason of having been named as beneficiary in a certificate, or otherwise, nor any contributing Employer, nor the Union, or any other person, partnership, corporation or association shall have any right, title or interest in or to the Annuity Fund or any part thereof. Under no circumstances shall any amount contributed by the Employers revert to them, or any of them."

It is obvious from the above provision that the Participant has no control over the contributions to the Annuity Fund and may not assign them, or pledge them, or borrow against them, or use them as his own.

Section 2 of the Plan provides for the administration of contributions by certain enumerated Trustees.

(2)(e) governs the Trustees power to reinvest all funds of the Annuity Plan in securities and they may purchase, lease, sell, exchange, convey or dispose of any property real or personal. They may borrow money to carry out the purposes of the fund and pledge any securities, and mortgage any property, real or personal, or any interest therein, for the payment of any such loans; lend monies upon such terms and conditions as they deem advisable; and do all acts, whether or not expressly authorized therein, which the Trustees may deem necessary or proper to effectuate the foregoing and for the protection of the property held under that section.

(2)(d) provides that the Trustees may employ counsel and agents and such clerical, accounting and actuarial ser-

vices as they may require. They may purchase supplies and equipment, pay salaries of employees, counsel fees, and the cost of supplies, equipment and payment of all other expenses which the Trustees find to be reasonable and necessary in connection with the administration of the Fund or which may have been incurred in connection with the establishment thereof, shall be paid upon their order from the Fund.

Thus we have the express authorization to invade the Fund and the contributions for the benefit of the participants which would diminish the contributions made for the benefit of the participants and the participant has no control over the acts of the Trustees made in good faith with reasonable care.

Obviously the "wages" of an employee participant earned within three months of the filing of the employer's petition were never intended under the Annuity Plan to be or become part of the Fund.

Whether the total sum of $5,114.00 claimed for the Annuity Plan was earned within three months before the filing of the petition would be immaterial, if in fact none of it is entitled to priority.

United States v. *Embassy Restaurant, Inc.*, (1959), 359 U.S. 29, 79 S. Ct. 554, is controlling, the facts in the instant case being almost identical with the facts in that case. Concerning the Embassy decision it was said in *Sulmeyer* v. *Southern California Pipe Trades Trust Fund*, (CA 9 1962), 301 F. 2d, 768.

> "(There) the Supreme Court held that contributions to be paid to a union welfare fund did not constitute 'wages' . . . due to workmen,' within the meaning of Sec. 64(a)(2) . . ., but the ratio decidendi of the

decision was the nature of the contributions involved, the Court stating, inter alia: 'They are flat sums of $8. per month for each workman. The amount is without relation to his hours, wages or productivity. It is due the trustees, not the workman, and the latter has no legal interest in it whatsoever. A workman cannot even compel payment by a defaulting employer. Moreover it does not appear that the parties to the collective agreement considered these welfare payments as wages. The contract here refers to them as 'contributions'. Finally Embassy's obligation is to contribute sums to the trustees, not to its workmen; it is enforceable only by the trustees who enjoy not only the sole title, but the exclusive management of the funds.' (359 U.S. at 32-33)

The *Sulmeyer* case is not in point. There the Court said:

"... no flat sum is involved, but rather a percentage of the employees' wages, and the amount varies directly according to wage rate and hours worked; and although the trustees do have certain supervisory powers over the trust funds, each employee has vested rights therein, with only the time of actual enjoyment being postponed until immediately before the Christmas holiday season and before the employee's vacation period; and, moreover, payments are made to the trust funds only after withholding therefrom the employees' personal income tax, social security and unemployment compensation deductions;"

"The only purpose of respondent's fund was to provide the employees with the vacation and holiday pay which they had earned, and which they, or their heirs,

> were certain to get. (Exhibit B, Addendum, Sec. 2(c) and Secs. 3(g) and 3(h).) It was not to provide benefits, such as are to be found in the Embassy case, which might or might not be obtained by the wage earner."

In the Embassy case the contributions as above noted were flat sums of $8.00 per month for each workman. *In Los Angeles Hotel-Restaurant Employer-Union Welfare Fund* v. *Bowie,* (C.A. 9 1960), 283 F.2d 516, Cert. Den., 365 U.S. 817, unpaid sums due to Union Welfare Funds from the employer under a collective bargaining agreement were denied priority on the authority of the Embassy Restaurant case, *supra.*

The Sulmeyer decision comments on the Bowie case in footnote (3) saying:

> "Petitioner, who either was a party in the Bowie case or who argues from the briefs there submitted, urges that the district court's distinction was rejected in Bowie because there the contributions were based on eight cents per hour worked by each employee, and consequently, bore a direct relationship to the employee's wages, hours and productivity. That the contributions in Bowie were controlled by the Embassy decision is apparent; eight cents an hour is a flat rate contribution remarkably similar to the $8 per month per full-time employee contributed in the Embassy case. Here, however, the contributions were seven and one-half per cent of the gross pay of each employee, which is not a flat rate in the same sense used in Embassy, and presumably, in Bowie. . . ."

The Embassy case cited with approval the rationale of *Local 140 Security Fund* v. *Hack,* (C.A. 2nd 1957), 242 F.2d,

375, and the Hack case in turn cited with approval *In re Brassel,* (N.D.N.Y. 1955) 135 F. Supp. 827, and Embassy also cited with approval *In re Victory Apparel Mfg. Corp.,* (D.C.N.J. 1957), 154 F. Supp. 819. Embassy overruled the holding *In re Embassy Restaurant, Inc.,* (CCA 3rd 1958), 254 F.2d 475, which cited with approval *In re Otto* (S.D. Cal. 1956), 146 F. Supp. 786.

In this pending matter the employer's contributions were to be $4. per day for each day worked by each employee who is a participant of the Annuity Plan. In the Bowie case the contribution was at the rate of eight cents per hour worked by each employee and in the Embassy case the contributions were flat sums of $8. per month for each workman. The analogy seems obvious and I hold as they did, that the contributions in the instant case are flat rate contributions without relation to hours, wages or productivity. The character of the debts were fixed as they were incurred.

In *Embassy* the Court said:

> "The contributions here are not 'due to workmen' nor have they the customary attributes of wages. Thus, they cannot be treated as being within the clear, unequivocal language of 'wages . . . due to workmen' unless it is clear that they satisfy the purpose for which Congress established the priority. That purpose was to provide the workman 'a protective cushion' against the economic displacement caused by his employer's bankruptcy." (*In re Victory Apparel Manufacturing Corp., supra*)
>
> "These payments, owed as they are to the trustee rather than to the workman, offer no support to the workman in periods of financial distress. Furthermore, if the claims of the trustees are to be treated on a

par with wages, in a case where the employer's assets are insufficient to pay all in the second priority, the workman will have to share with the welfare plan, thus reducing his own recovery."

In the *Hack* case *supra,* our Court of Appeals speaking through Judge Leibell said:

"The claim in its origin must be one for wages due to a workman, to be entitled to priority under Section 64(a)(2). If it is, the right of priority carries over to the workman's assignee. If the claim was never a part of his wages and was never a sum due to him, it would not be entitled to priority; and no theory of an indirect conditional benefit to him can give it priority. 'The priority is attached to the debt, and not to the person of the creditor; to the claim and not to the claimant.'" (*Shropshire, Woodliff & Co.* v. *Bush,* 204 U.S. 186;)

Judge Hincks concurring said:

"I add these few words only to make it plain that in my opinion the indicated result is required (affirming the order of the District Judge) not only because the debts for which the statutory priority is claimed are not 'wages' but also because they are not 'due to workmen, servants, clerks, etc.' To me it seems self-evident that the appellant Fund is not a workman. Nor have any of the 'workmen' assigned their claims to the appellant. It appears to me wholly inadmissable to say that the appellant is an 'equitable assignee' of the 'workmen' when, as the appellant truly says in its brief, no employee 'has any right, title or interest

in the trust fund, except the right to insurance coverage and welfare benefits'; and 'No employee has an option to receive any part of the employer's contribution in lieu of insurance benefits.'"

In reviewing these various decisions additional points are made which seem pertinent as a test for priority. *In re Brassel, supra,* the contributions were held not entitled to the status of wages because the basis for benefit was union membership not the employment relationship.

In the *Hack* case, *supra,* both the City of New York and the U.S. Government who were tax claimants joined in opposing priority for the funds claimed.

Also, Section 17 of the Bankruptcy Act exempts from the effects of a discharge such debts as are for wages which have been earned within three months before the date of the commencement of the proceedings in bankruptcy due to workmen, servants, clerks, etc. Embassy suggested that if the instant claim were allowed priority as wages it would be non-dischargeable to the extent set forth in Section 17. And the Annuity Plan might seek to collect these wages from each employee participant, thus an obligation of the workman might be created which was never intended by the parties to the Collective Bargaining Agreement.

The Attorney for the Trustee has been advised by Jacob Turoff, Certified Public Accountant of the firm of Schwartz & Turoff, the accountants for the debtor in possession and for the Trustee, that the contributions made to the plan were not deducted by the bankrupt in its corporate income tax return as salaries and wages, but were deducted as a contribution to an Annuity Plan, as provided for in the return, (see item 25(a) of Form 1130-U.S. Corporation Income Tax Return).

The United States Attorney appearing and opposing that part of the stipulation at issue showed that it had filed a claim for Internal Revenue taxes in the arrangement proceeding in the amount of $15,587.55, and that the debtor in possession during the arrangement failed to pay certain taxes, and Supplemental Statements of Internal Revenue Taxes due were filed in the amounts of $4,343.58 and $31.27. Therefore it is a party interested in the status of the claim and its claim for taxes would be directly affected by any determination as to priority. Although the stipulation between the Trustee and the Joint Industry Board of Electrical Workers, Local No. 3, was submitted without notice to the United States, the United States is a proper party in interest and has submitted its memorandum relying on the Embassy decision and distinguishing the Sulmeyer case. The United States Attorney concludes that priority should not be accorded to the $5,114.00 portion of the claim. And in further support of his position he quotes from the matter of *Sleep Products, Inc.,* 141 F. Supp. 463 (D.C.N.Y., 1956), Aff'd. 242 F.2d 375, Cert. Den 355 U.S. 833 rehearing denied 358 U.S. 860, which holds that such contributions are not chargeable to wages or current income to the employee. See also Internal Revenue Code of 1954, Sections 403(a)(1) and 404(a)(2).

For all of the foregoing reasons I find and decide that the item of $5,114.00 of Claim No. 4 of the Joint Industry Board of Electrical Workers, Local No. 3 is a claim for contributions to the Union Annuity Funds. That the sum of $5,114.00 is not comprised of wages or commissions not to exceed $600.00 to each employee of the bankrupt or debtor which had been earned within three months before the date of the commencement of the within proceedings (Sec. 64(a)(2)). And that no part of said amount of claim is entitled to priority under said section.

That paragraph (a) of the stipulation entered into between the Joint Industry Board of the Electrical Industry, Local No. 3 and the Trustee, dated June 14, 1965, under which said sum of $5,114.00 would be allowed as a priority claim may not be approved.

That the sum of $5,114.00 is a general claim and the order heretofore submitted for the purpose of approving said stipulation has been signed and entered simultaneously herewith, as amended, to allow said item of $5,114.00 as a general claim only.

Dated at Jamaica, New York,
April 25, 1966.

/s/ SHERMAN D. WARNER,
Referee in Bankruptcy.

Stipulation Allowing Claim as a Priority Wage Claim

(R. pp. 14-15)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

IT IS HEREBY STIPULATED, CONSENTED TO AND AGREED that Claim #4 filed by the Joint Industry Board of the Electrical Industry, Local #3, filed in the sum of $10,537.34 in the within proceedings, be and the same hereby is allowed as follows:

(a) That portion of the claim representing funds payable by the bankrupt into Union Annuity Funds in the sum of $5,114.00 for which priority was asserted, is to be allowed as a priority claim.

(b) That portion of the claim representing deductions from payroll in the sum of $510.00, for which priority was asserted, is to be allowed as a priority claim.

(c) That portion of the claim representing vacation expense account in the sum of $1,624.53, for which priority was asserted, is to be allowed as a general unsecured claim.

(d) That the remainder of the claim representing Pension, Hospitalization and benefits in the sum of $2,030.66, cost of administration funds in the sum of $304.60, 1% of payroll for Local Employees Benefit Board in the sum of $572.72, and disability contributions benefits plan in

the sum of $380.83, are to be allowed as general unsecured claims.

(e) That the funds hereinabove set worth entitled to priority amount to $5,624.00 and said claim #4 is to be allowed as a priority claim for said sum of $5,624.00.

(f) That the balance of the aforesaid claim amounting to $4,913.34, is to be allowed as a general unsecured claim.

and it is

FURTHER STIPULATED, CONSENTED TO AND AGREED that an order on the within stipulation may be submitted to Hon. Sherman D. Warner, Referee in Bankruptcy in these proceedings without further notice.

Dated: Brooklyn, New York,
June 14, 1965.

/s/ SCHWARTZ & DUBERSTEIN,
Attorneys for trustee.

HAROLD STERN,
Attorney for Joint Industry Board
of the Electrical Industry, Local #3

Affidavit of Harold Stern

(R. pp. 31-41)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

HAROLD STERN, being duly sworn, deposes and says:

1. I am the attorney for the Joint Industry Board of the Electrical Industry. I make this affidavit in support of the Petition to Review and reverse the Order herein of Honorable Sherman D. Warner, Referee in Bankruptcy.

2. On June 14, 1965, I, as attorney for the Joint Industry Board of the Electrical Industry, entered into a stipulation with Schwartz & Duberstein, Esquires, attorneys for the Trustee in Bankruptcy, which provided among other things "(a) That portion of the claim representing funds payable by the Bankrupt into Union Annuity Fund in the sum of $5,114.00. for which priority was asserted, is to be allowed as a priority claim."

3. As consideration for said stipulation I withdraw the Joint Industry Board's claim to wage priority for other sums payable on behalf of the bankrupt's employees. Had I not anticipated that said stipulation would be approved by the Referee, I would not have entered into it.

4. Referee Warner held no hearing, and no facts are in dispute with respect to this matter.

5. Each employer in the electrical construction industry in the New York area contributes on behalf of each employee the sum of $4.00. for each day worked, which sum has been credited to his individual account (Section 6 of the Annuity Plan, set forth in the Referee's Decision at page 4). Every month each employee receives a statement setting forth every payment made into his account and his balance in his account.

6. Referee Warner relied in his Decision, dated April 25, 1966, upon the language of the Annuity Plan of the Electrical Industry Agreement, including language which is irrelevant to this matter. He also relied on inferences with respect to possible occurrences which might affect the status and integrity of employer payments to the Annuity Fund, which have in fact never occurred and never can occur.

7. Referee Warner stated five conclusions which allegedly supported his decision that payments to the Annuity Fund are not entitled to wage priority. The Referee erred with respect to each of his conclusions.

8. The Referee's first conclusion (Decision, page 8) is that "the Participant has no control over the contributions to the Annuity Fund * * * ". The Referee based his conclusion upon Section 9, paragraph (c) of the Annuity Plan, which provides that no person "shall have any right, title or interest in or to the Annuity Fund or any part thereof". This provision, however, protects the Participant from creditors and other claimants but does not pre-

vent any Participant from obtaining the monies accumulated in his personal account when he ceases to be employed in the electrical industry in New York; he can of course cease such employment whenever he wishes.

9. The Referee's second conclusion (Decision, page 9) is that because the Trustees have a right to invest the funds and pay salaries, there is "express authorization to invade the Fund and the contributions for the benefit of the Participants which would diminish the contributions made for the benefit of the Participants * * * ". This conclusion is erroneous. Since the Annuity Fund commenced operations in 1954 it collected credits for annuitants in the sum of $110,990,345. and paid out to Participants and their beneficiaries the sum of $26,657,642; the total net credits are $84,332,703. The Annuity Fund maintains a separate account for the income earned from the employer contributions. The income fund balance is now $10,056,388; the income for the past six months was $543,413. Of the income fund balance $3,081,797. is reserved for the payment of death benefits.

With respect to administration expenses. The Annuity Plan administers the Annuity Fund which includes the individual accounts of approximately ten thousand (10,000) men. Naturally, such work entails the employment of clerks, stenographers and other clerical help. The administrative cost of operating the Annuity Plan is less than one (1%) percent compared to administration expenses of operating similar funds which run from five (5%) percent to ten (10%) percent.

Never has a single Participant been deprived of a penny of his equity on account of administration expenses or for any other reason. This statement is easily verifiable

through records of investigation by, and reports to, the Internal Revenue Service, the New York State Insurance Department, and Certified Public Accountants.

10. The Referee in his Decision (pages 5, 6 and 7) sets forth the clauses relating to various death benefits paid to beneficiaries of Participants. Millions of dollars in death benefits are paid out from the income earned from the Participants' funds. They are not payable out of principal. In view of the abundant income available for the payment of death benefits, the Referee clearly has no reason to suppose that the principal of the Participants' accounts might be invaded for any cause whatever.

11. That Referee's third conclusion (Decision, pages 9 et seq.) is that *United States* v. *Embassy Restaurant, Inc.*, 1959, 359 U.S. 29, 79 S.Ct. 554, is controlling. In my brief to the Referee, I not only set forth four substantial distinctions between the facts in Embassy and the instant case, but I showed that the language in *Embassy* requires a ruling in the instant case which is contrary to the Referee's Decision. I attach hereto copy of my brief to the Referee.

12. The Referee's fourth conclusion (Decision, page 13) is that if the instant claim were allowed wage priority, since it would then be non-dischargeable, "the Annuity Plan might seek to collect these wages from each employee Participant, thus an obligation of the workman might be created, which was never intended by the parties to the Collective Bargaining Agreement." This argument is likewise without merit. In the first place the moment the instant claim is allowed priority as wages the Trustee in

Bankruptcy will be free to pay this claim and he has funds available. In the second place, I as attorney for more than thirty years for the Union and also for the Joint Industry Board of the Electrical Industry, which consists of representatives of all the parties to the Collective Bargaining Agreement, categorically state that no party to the Collective Bargaining Agreement has ever contemplated seeking to collect wages from employee Participants, and I would advise all parties that the Joint Industry Board has no right under any circumstances to collect these wages from the Participants.

13. Finally, the Referee cites and appears to adopt (Decision, page 14) the argument of the United States Attorney, that *Sleep Products, Inc.*, 141 F. Supp. 463 (D.C. N.Y., 1956) aff'd 242 F. 2d 375, cert. den. 355 U. S. 833, which holds that where the employer does not pay withholding taxes, his contributions are not chargeable to wages and are not current income to the employees, is applicable herein. We urge that *Sleep Products* has been superseded by *Embassy Restaurant, Inc.*, which does not hold that failure to pay withholding taxes deprives contributions of their status as wages under the Bankruptcy Act.

14. The Referee by upholding *Sleep Products* and applying said doctrine to the Annuity Fund thereby produced the result that payments are not "wages due to workmen" unless part thereof is immediately paid to an entity other than the workman, namely, the United States Government. Under our Annuity Plan a larger share of this money goes to the workman because taxes are not withheld, and he usually asks for his money when he ceases to be employed in the electrical industry in New York or he retires, so

that his income tax rate is lower at that time. Of course, if he chooses to collect his equity while he is earning substantial income by working for someone other than a "contributing employer" he may do so and he would then not reduce his income tax rate, but the choice is his. Surely Section 64(a)(2) of the Bankruptcy Act was not enacted to maximize collection of income taxes on behalf of the Bureau of Internal Revenue.

HAROLD STERN

(Sworn to May 4, 1966.)

Memorandum, Annexed to Foregoing Affidavit

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

MEMORANDUM IN SUPPORT OF STIPULATION ALLOWING CLAIM ON BEHALF OF ANNUITANTS AS PRIORITY WAGE CLAIM.

STATEMENT

This memorandum is submitted on behalf of the Joint Industry Board of the Electrical Industry in support of the status as a priority wage claim of $5,114.00. payable to the Participants of the Annuity Plan of the Electrical Industry, hereinafter named.

No facts are at issue with reference to the foregoing claims.

POINT I

THE CLAIM OF THE JOINT INDUSTRY BOARD IS ENTITLED TO WAGE PRIORITY IN THE AMOUNT OF $5,114.00.

As set forth in the Proof of Claim made by Denis J. Crimmins, Executive Secretary of the Joint Industry Board of the Electrical Industry, timely filed on February 15, 1963 with the Clerk of the United States District Court for the Eastern District of New York, the Debtor became indebted to the Annuity Plan in the amount of $5,114.00,

all of which accrued between November 1, 1962 and January 10, 1963—within three (3) months prior to the filing of the petition herein. Pursuant to collective bargaining agreement between the Debtor and Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, the Debtor paid over $4.00 for each day which the employee worked, to the Annuity Fund and said sums were credited to the individual account of each employee, except that the Debtor failed to pay over the sum of $5,114.00, as aforesaid.

Under the terms of the Annuity Plan:

> "7(e)(1) In the event that a Participant should become permanently disabled, cease to be a Participant, or enter the Armed Forces of the United States, then such Participant shall cease to be covered by this Annuity Plan and he shall be entitled to receive the sum of Fifty ($50.00) Dollars per month until the monies credited to such Participant's account have been exhausted and such Participant shall receive no other benefits.
>
> "(e)(2) In the event that such former Participant should die before he has exhausted his account, then and in that event the balance accumulated in such former Participant's account shall be paid to such deceased's beneficiary in monthly installments of One Hundred ($100.00) Dollars each, or in a lump sum, as the Trustees may decide. Commencing July 1, 1964, the aforesaid monthly installments shall be increased to $125.00. per month."

In addition each employee may borrow from his individual account while continuing to work, when he needs a loan.

The aforesaid $5,114.00. belongs to the following employees:

Social Security #	*Name*	*Annuity*
115-18-1511	W. Bantel	$ 184.00.
104-28-3513	T. J. Cleary	190.00.
237-18-9048	A. M. Condrey	180.00.
129-14-0808	W. J. Conkling	188.00.
090-12-4690	M. J. Conlon	180.00.
071-32-7765	J. J. Constantino	184.00.
085-32-1620	V. Cupola	160.00.
123-34-5496	F. Dellaquila	176.00.
074-20-9463	F. A. Dooner	188.00.
089-14-8408	J. J. Hannaford	128.00.
365-16-6616	G. A. Hester	Terminated
113-34-3428	E. A. Hoffman	204.00.
067-09-8572	W. Hoffman	80.00.
130-32-6461	P. Horacek	128.00.
415-20-7994	J. P. Jones	4.00.
076-34-1874	I. Katzman	180.00.
129-28-4306	D. R. Kimmel	204.00.
244-10-6897	L. M. Lawing	44.00.
156-18-1875	L. Lunau	112.00.
107-07-7008	E. McCarthy	132.00.
084-08-9665	L. Micene	84.00.
086-16-6165	B. Miller	180.00.
099-23-4730	A. V. Newberry	48.00.
071-18-9186	C. Perlstein	128.00.
114-28-3247	J. Perretta	172.00.
085-36-4504	J. Ragozino	112.00.
073-34-8440	A. Reiss	192.00.
089-30-3542	E. Renzulli	180.00.

Social Security #	*Name*	*Annuity*
123-32-5000	M. Salzano	104.00.
119-32-5744	T. Scully	192.00.
101-07-6505	C. Sjoli	148.00.
110-28-0132	B. F. Stringfield	92.00.
085-34-3251	T. J. Watson	180.00.
123-20-1852	B. Wimpel	128.00.
126-30-2303	J. C. Ziegler	176.00.
051-18-1701	H. Hallums	100.00.
066-17-0791	C. Gibson	8.00.
374-30-7364	J. R. Roberts	24.00.
076-22-6606	W. Beaman	12.00.
254-18-2408	M. Sims	8.00.
	TOTAL	$5,114.00.

Any doubt that this claim is entitled to wage priority is probably based upon *United States* v. *Embassy Restaurant, Inc., et al.*, 359 U. S. 29. This case is not in point. It concerns a Welfare Fund, not an Annuity Fund. In the *Embassy Restaurant* case the Court denied priority to the Welfare Fund for four reasons each inapplicable to the instant case:

> 1. "Let us examine the nature of these contributions. They are flat sums of $8, per month for each workman. The amount is without relation to his hours, wages or productivity." (359 U. S. 32).

In the instant case the employer-contributions was not a flat sum, without relation to the time worked, but was $4.00. for each day worked by each employee.

2. "It is due the trustees, not the workman, and the latter has no legal interest in it whatsoever." (359 U. S. 32).

In the instant case the individual employees, not the Trustees have the final vested interest in the sums placed in their individual accounts.

3. "These payments, owed as they are to the trustee rather than to the workman, offer no support to the workman in periods of financial distress." (359 U. S. 33).

In the instant case the workman relies on these sums in his account when in financial distress, whether unemployed or employed but nevertheless in need.

4. "Furthermore, if the claims of the trustees are to be treated on a par with wages, in a case where the employer's assets are insufficient to pay all in the second priority, the workman will have to share with the Welfare Plan, thus reducing his own recovery." (359 U. S. 33-34).

In the instant case a workman would not be prejudiced, but rather would be aided, by having the Annuity Fund share in the second priority.

With reference to the possible argument that Congress failed specifically to allow priority for contributions to individual Annuity Funds for workmen by amending the Bankruptcy Act it should be noted that such Annuity Fund, as distinguished from Pension and Welfare Funds, are a very new development, and Congress has had little opportunity to legislate with specific reference to workmen's Annuity Funds.

We respectfully refer the Referee to *Sulmeyer* v. *Pipe Trades Trust Fund*, 301 Fed. (2d) 768, CA 9, 1962. That Court affirmed a judgment holding that the claim of a Vacation and Holiday Benefit Fund was a priority wage claim and pointed out that the Vacation and Holiday benefits, unlike the Welfare *benefit* in *Embassy*, had been *earned* by the employees and are *certain*. Clearly, therefore, the Joint Industry Board, on behalf of the employees set forth above, is entitled to wage priority for its claim in the amount of $5,114.00.

CONCLUSION

The stipulation allowing the claim of the Joint Industry Board as a priority wage claim should be upheld.

Respectfully submitted,

Dated: July 14, 1965.

HAROLD STERN,
Attorney for Claimants.

Of counsel:

HAROLD STERN,
NORMAN ROTHFELD.

Petition for Review

(R. pp. 43-45)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

To the Honorable Judges of this Court:

The petition of the Joint Industry Board of the Electrical Industry, an unincorporated association, respectfully represents:

1. Your petitioner is aggrieved by the Order herein of Sherman D. Warner, Referee in Bankruptcy, dated April 25, 1966, a copy of which Order is annexed hereto, marked Exhibit "A" and made a part hereof.

2. The Referee erred with respect to said Order in that he misinterpreted Section 64a(2) of the Bankruptcy Act, and he misinterpreted the decision of the Supreme Court of the United States in *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29, 79 S. Ct. 554, and he misinterpreted the nature of the operation of the Annuity Fund of the Electrical Industry, all with the result that the Referee held that your petitioner's claim for the sum of $5,114.00 was not entitled to wage priority, and he reduced said claim to a general claim.

WHEREFORE, your petitioner prays that said Order be reviewed by a Judge in accordance with the provisions of

the Bankruptcy Act, that said Order be reversed, and that your petitioner have such other and further relief as is just.

Dated: New York, April 29, 1966.

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY,
Petitioner.

HAROLD STERN,
Attorney for Petitioner,
Office and Post Office Address,
No. 70 Pine Street,
New York, New York 10005,
WHitehall 4-9177.

(Verified.)

Certificate of Review

(R. pp. 46-47)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

TO THE HONORABLE JUDGES OF THIS COURT:

I, SHERMAN D. WARNER, the Referee in charge of the above entitled proceeding, do hereby certify pursuant to Section 39a(8) as follows:

The order certified for review was made by me on April 25, 1966, in which and by which I allowed claim No. 4 filed by the Joint Industry Board of the Electrical Industry, Local No. 3, in the sum of $10,537.34, as a general claim in the sum of $10,027.34 and in the sum of $510,000 as a priority claim, denying priority to an item in said claim of $5,114.00.

This order is based upon my written decision dated April 25, 1966, and the facts are fully set forth therein.

The errors alleged are set forth in paragraph 2 of the petition for review dated April 29, 1966 filed by the attorney for petitioner.

Submitted herewith are the petition for review, the order to be reviewed, containing stipulation dated 6/14/65 of attorneys for trustee and attorneys for petitioner, my written decision, affidavit of mailing of notice of entry of order dated April 25, 1966, correspondence in memorandum form, memoranda of law, other correspondence, photo copy of original claim No. 4 of petitioner, waiver of deposit of peti-

tioner, and booklet of annuity plan of the Electrical Industry.

Dated at Jamaica, New York
May 23, 1966.

/s/ SHERMAN D. WARNER
Referee in Bankruptcy.

PLEASE TAKE NOTICE that this review shall be placed on the Bankruptcy Motion Calendar for argument on the 8th day of June 1966 at 10:00 A.M. at the United States Court House, Room No. 7, 225 Washington Street, Brooklyn, New York.

In connection with this review your attention is respectfully called to General Rule 9(c) of this Court.

Referee's Certificate and Notice mailed this day to:

SCHWARTZ & DUBERSTEIN, Esqs.
26 Court Street
Brooklyn, New York
Attorneys for Trustee.

HAROLD STERN, Esq.
70 Pine Street
New York, N. Y. 10005
Attorney for Joint Industry Board of the
Electrical Industry, Local #3.

JOSEPH P. HOEY, Esq.
United States Attorney
225 Washington Street
Brooklyn, New York.

Dated at Jamaica, New York
May 24, 1966.

/s/ SHERMAN D. WARNER,
Referee in Bankruptcy.

Priority Wage Claim

(R. pp. 48-52)

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

DENIS J. CRIMMINS of No. 420 Lexington Avenue, in the County of New York, State of New York, says:

I am the Executive Secretary of the Joint Industry Board of the Electrical Industry, an unincorporated association, with its principal office at 420 Lexington Avenue, Borough of Manhattan, City and State of New York, and am duly authorized to make this proof of claim on its behalf.

The Debtor, located at 61-51 Fresh Meadow Lane, Flushing, Long Island, New York, was at and before the filing of this petition and still is indebted to claimant in the amount of $10,537.34.

The consideration of this debt is as follows:

The Debtor operated under a collective bargaining agreement with Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO. By the terms of this agreement the Debtor was required to contribute to, and the claimant was empowered and required to administer, various Trust Funds established for the welfare of the employees of the Debtor.

The Debtor has failed to make certain required payments for the above described funds during the three months prior to the filing of its petition.

The Annuity Plan of the Electrical Industry incorporated as part of the Debtor's collective bargaining agreement in Article II, Section 1(e) thereof, provides as follows:

> "(a) Beginning with the first payroll week after January 1, 1954, and every week thereafter up to December 31, 1957, and for the duration of any renewal or extension of the collective bargaining agreement between the Employer and the Union, each electrical contractor shall pay into the Annuity Fund the sum of Four ($4.00) Dollars per day for each day worked by each employee who is a Participant of this Annuity Plan.
>
> "(b) The aforesaid Employer contributions under paragraph (a) hereof shall be credited to the individual account of each Participant but shall be payable to him only as hereinafter provided.
>
> "(c) Such contributions shall be forwarded weekly to the Trustees within one (1) week after each payroll period."

The Debtor has failed to pay over to claimant this $4.00 per day contribution in the amount of $5,114.00. This sum constitutes a priority wage claim because these monies are held by claimant for the individual accounts of the employees of the Debtor.

The Debtor's collective bargaining agreement provides in Article II, as follows:

"Vacation Expense Plan:

"Section 1(f). The Joint Industry Board shall administer the Vacation Expense Plan. Except as hereinafter provided, in order to provide journeymen electricians covered by this agreement with expenses for a two week vacation each year to be granted at a time agreed upon by the employer and the journeymen electricians, all employers shall pay four (4%) percent of their weekly production payroll effective January 1, 1962. These payments shall be remitted weekly to the Vacation Expense Fund of the Joint Industry Board from which all journeymen who have worked for or have been unemployed and available to work for members of the Joint Industry Board in New York City for the twelve (12) months preceding May 1, 1962, May 1, 1963 and May 1, 1964 shall be paid expenses from the Vacation Expense Fund as determined by the Vacation Committee depending upon the financial condition of the Vacation Expense Fund. Commencing May 1, 1963 journeymen electricians who have worked for contributing employers for twenty-five (25) years or more shall be granted expenses for a three (3) week vacation each year."

The Debtor has failed to pay over its required contributions to the Vacation Expense Plan set forth above to the Joint Industry Board in the sum of $1,624.53, all of which is entitled to priority because the computation of these monies is based upon the earnings of each of the employees and because each of the employees receives his vacation pay from these contributions.

The Debtor deducted $510.00 from the weekly wages of its employees for the purpose of transmitting this sum to the claimant, as follows:

The Debtor's employees executed the following Partial Wage Assignments "I hereby authorize my present employer, or any future employer, to deduct $10.00 from my wages each week until loan is paid in full and remit the same directly to the Loan Fund-Pension Committee, J.I.B. 420 Lexington Avenue, New York 17, N. Y., Room 208." Pursuant to these Partial Wage Assignments, the Debtor deducted $510.00 from the employees' wages, which payments he failed to transmit to the claimant. Same is a priority claim because it is a portion of the employees' actual wages.

The Pension, Hospitalization and Benefit Plan, which is incorporated as part of the Debtor's collective bargaining agreement in Article II, Section 1(d) thereof, provides as follows in Section 3 of said Plan:

> "3. The Pension, Hospitalization and Benefit Plan shall be financed as follows:
>
> "(a) All Employers who employ A, DMS, G, J and M members of Local Union No. 3 (or those working as such) shall pay five (5%) per cent of their weekly production payroll.
>
> "(b) * * *. All payments shall be made the payday after the payroll week ending."

The Debtor has failed to pay over its required contributions to the Pension, Hospitalization and Benefit Plan in the amount of $2,030.66.

The Debtor's collective bargaining agreement also provides in Article II, Section 1(d), (e), (f) and (g) thereof

that the Joint Industry Board shall administer the various funds and the cost of said administration shall be borne by each employer. Said expense which is equal to three-fourths (¾ths) of one (1%) percent of the weekly payroll was not paid by the Debtor during the three months prior to the filing of its petition, which delinquency is in the amount of $304.60.

The Debtor's collective bargaining agreement provides in Addenda No. 2 thereof, as follows:

> "It is agreed that in accord with the National Employees Benefit Agreement entered into between the National Electrical Contractors Association and the International Brotherhood of Electrical Workers on September 3, 1946, as amended, the Employer will forward weekly an amount equal to 1% of his gross labor payroll paid to workmen employed under the terms of this agreement, to the designated Local Employees Benefit Board.
>
> "The Employer will also forward weekly a payroll report on a form prescribed for that purpose by the National Board."

The Debtor has failed to pay over the one (1%) percent of payroll contribution to the above Trust Fund in the amount of $572.72.

NEW YORK STATE DISABILITY—The collective bargaining agreement, with reference to Disability Insurance, provides:

> "ARTICLE V. 3. Every Individual Employer agrees to provide for electrical workers in his employ increased benefits under the New York State Disability

Benefits Law of $45.00 per week for twenty-six (26) weeks.

"In an effort to increase payments to electrical workers and to lengthen the period for such payments every individual Employer agrees to participate in a Group New York State Disability Benefit Plan to be operated through or by the Joint Industry Board of the Electrical Industry."

The Debtor was delinquent in its payments to the Group New York State Disability Benefit Plan in the amount of $380.83.

No part of the above total of $10,537.34 has been paid, and there are no set-offs or counterclaims thereto, nor is any security being held therefor.

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY,

/s/ Denis J. Crimmins
DENIS J. CRIMMINS,
Executive Secretary.

To: HAROLD STERN, Esq., 70 Pine Street, New York 5, New York, or representative.

Trustee's Notice of Appeal

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

[SAME TITLE]

Sir:

PLEASE TAKE NOTICE that Warren C. Schwartz, trustee in bankruptcy of A & S Electric Corp., bankrupt, joins in the appeal to the United States Court of Appeals for the Second Circuit from the order of the Honorable George Rosling entered in this action on November 4, 1966 confirming the order of Honorable Sherman D. Warner, Referee in Bankruptcy and further joins in the memorandum of law of the appellant Joint Industry Board for the Electrical Industry thereon.

Dated: Brooklyn, New York
January 13, 1967.

Yours, etc.,

SCHWARTZ & DUBERSTEIN and
LOUIS FELSTINER,
Attorneys for Trustee,
26 Court Street,
Brooklyn, New York.

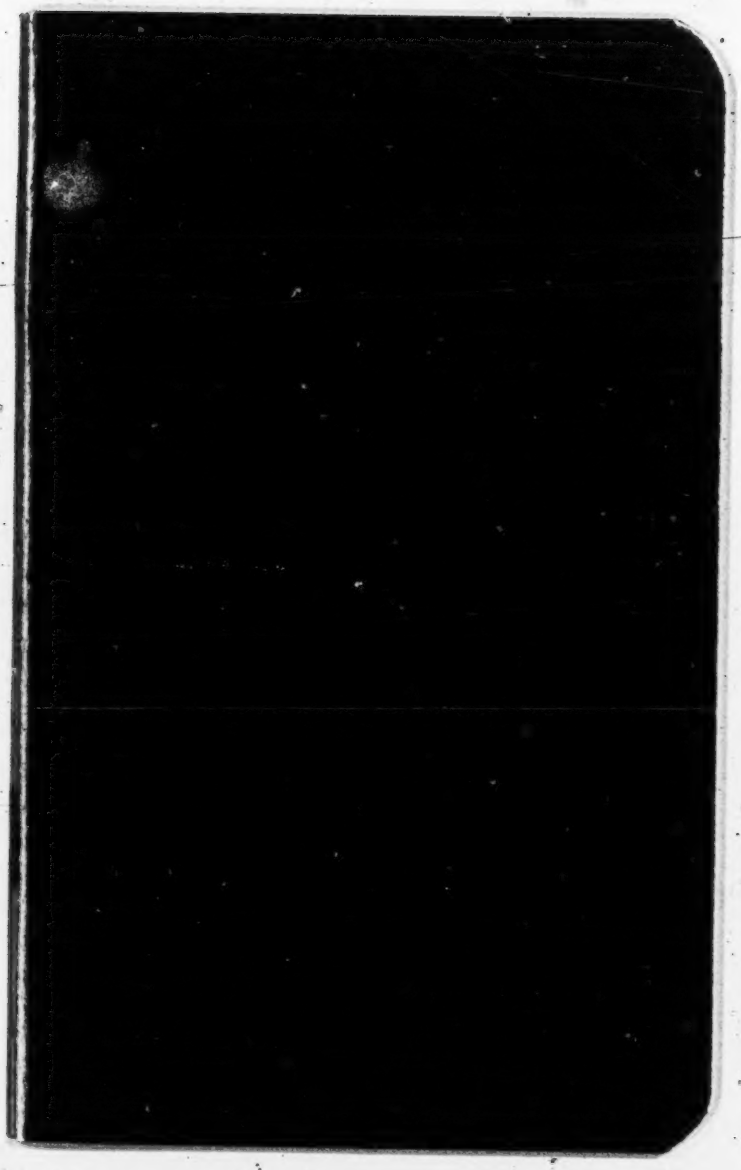
To:

U. S. ATTORNEY,
225 Washington Street,
Brooklyn, New York.

Booklet of Annuity Plan of the Electrical Industry

(R. pp. 53-67)

(See opposite) ☞



Booklet of Annuity Plan of the Electrical Industry

(R. pp. 53-67)

(See opposite)

ANNUITY PLAN OF THE ELECTRICAL INDUSTRY AGREEMENT entered into and adopted at New York City the 11th day of December 1957, by and between the NEW YORK ELECTRICAL CONTRACTORS' ASSOCIATION, INC., the MASTER ELECTRICAL CONTRACTORS' ASSOCIATION, INC., the GREATER CITY ELECTRICAL CONTRACTORS' ASSOCIATION, INC. and the ASSOCIATION OF ELECTRICAL CONTRACTORS, INC., each an employers trade association, having its principal place of business located in the City of New York, representing the employers in the electrical contracting industry, hereinafter jointly referred to as the "Employer" or the "Employer Association" and LOCAL UNION No. 3 of the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, hereinafter referred to as the "Union," and last amended effective July 1, 1964.

WITNESSETH:

WHEREAS, the Employer and the Union entered into a collective bargaining agreement which under its terms remains in effect until June 30, 1966 and from year to year thereafter, under which it was agreed, among other things, that an Annuity Plan of the electrical industry should be administered for the electrical contracting industry in the City of New York, for the purpose of providing retirement and death benefits to the workers included within the bargaining unit represented by the Union under the collective bargaining agreement between the Employer and the Union in order to aid such workers, their families, and better their every-day living conditions;

NOW, THEREFORE, this Agreement is intended to set forth the terms and conditions of the Annuity Plan:

Booklet of Annuity Plan of the Electrical Industry

(R. pp. 53-67)

(See opposite)

In consideration of the premises and of their mutual covenants, the parties agree as follows:

1. *Title:* This Plan shall be known as the "Annuity Plan of the Electrical Industry."

2. *Administration:* The Plan shall be administered by Trustees, as herein provided:

(a) The Trustees shall consist of four (4) Employer representatives designated by the Employer and four (4) Union representatives designated by the Union. All vacancies shall be filled by the side on which the vacancy occurs. The Trustees shall elect a Chairman, Treasurer and Secretary from among their members. They, and each one of the Trustees, shall constitute a Board of Trustees. A quorum at meetings shall consist of at least two (2) Trustees representing the Employer and two (2) Trustees representing the Union. All moneys shall be deposited in a bank or trust company in the name of the "Annuity Fund of the Electrical Industry," and shall be known as the "Annuity Fund of the Electrical Industry," and all withdrawals from such Fund shall be signed and countersigned by two (2) Trustees, one (1) of whom shall be an Employer-Trustee and the other shall be a Union-Trustee, and accounted for to the Annuity Plan of the Electrical Industry in semi-annual statements.

A person designated by the United States District Court for the Eastern District of New York or by any other court or public body to represent the public and to be known as the "Public Member" shall meet and confer with the Trustees.

(b) The Trustees shall keep full and complete records of the administration of the Fund, which shall be open to inspection at all reasonable hours by any contributing Employer or by the duly authorized officials of the Union or by the duly authorized representatives of any such Employer

or authorized Union official. Annual audits shall be made by Certified Public Accountants licensed by the State of New York, employed by the Trustees, and a statement of the results of such audit shall be available for inspection by the Employer, the Union and the individual Participants at the principal office of the Trustees. A copy of such statement shall be furnished by the accountants to each member of the Board of Trustees.

(c) The Trustees may also appoint an Executive Secretary who shall attend all meetings of the Trustees, keep minutes of the proceedings and carry on the correspondence. He shall conduct all business assigned to him by the Trustees or by the Chairman.

(d) The Trustees may employ counsel and agents and such clerical, accounting and actuarial services as they may require in carrying out the provisions of the Annuity Plan of the Electrical Industry. They may purchase such supplies and equipment as in their discretion they may find necessary and appropriate in the performance of their duties. The salaries of employees, the fees of counsel and other experts and the cost of supplies, equipment and payment of all other expenses, which the Trustees find to be reasonable and necessary in connection with the administration of the Fund or which have been incurred in connection with the establishment thereof, shall be paid upon their order from the Fund.

(e) The Trustees shall be empowered to invest and re-invest all funds of the Annuity Plan in such housing, mortgages, Government and other securities as they may select in their sole discretion and to purchase, lease for any term of years, sell, exchange, convey or dispose of any property, whether real or personal, or any interest therein, all of which shall be at such prices and upon such terms and conditions as said Trustees may deem

Booklet of Annuity Plan of the Electrical Industry

(R. pp. 53-67)

(See opposite)

advisable to carry out the purposes of the fund and whether or not any of the foregoing are authorized by law for the investment of trust funds generally; to borrow money in such amounts and upon such terms and conditions as shall be deemed advisable by the Trustees to carry out the purposes of the fund and to pledge any securities and to mortgage any property, real or personal, or any interest therein, for the payment of any such loans; to lend monies upon such terms and conditions as they deem advisable; and to do all acts, whether or not expressly authorized herein, which the Trustees may deem necessary or proper to effectuate the foregoing and for the protection of the property held hereunder.

(f) Each of the Trustees shall be protected in acting upon any paper or document believed by him to be genuine and to have been made, executed and delivered by the proper party purporting to have made, executed or delivered the same, and shall be protected in relying and acting upon the opinion of legal counsel in connection with any matter pertaining to the administration or execution of this Fund. No Trustee shall be liable for any action taken or omitted by him in good faith and in the exercise of reasonable care, nor for the acts of any agent, employee or attorney selected by the Trustees with reasonable care, nor for any act or omission of any other Trustee.

(g) The Trustees shall not be liable for the making, retention, or sale of any investment or reinvestment made by them as herein provided, nor for any loss to or diminution of the Trust Fund, except due to their wilful misconduct or fraud. The Trustees shall not be liable for any action taken or omitted by them in the exercise of reasonable care or in reliance upon the opinion of legal counsel.

(h) Neither the Trustees or any individual or successor Trustee shall be personally answerable or liable for any liabilities or debts of the Fund contracted by them as such Trustees, or for the non-fulfillment of contracts, but the same shall be paid out of the Annuity Fund of the Electrical Industry, chargeable therefor, and the Annuity Fund of the Electrical Industry is hereby charged with a first lien in favor of such Trustees for his or their security and indemnification for any amounts paid out by any Trustee for any such liability and for his and their security and indemnification against any liability of any kind which the Trustees or any of them may incur hereunder; provided, however, that nothing herein shall exempt any Trustee from liability arising out of his own wilful misconduct, bad faith or gross negligence, or entitle such Trustee to indemnification for any amounts paid or incurred as a result thereof.

(i) The Trustees shall have the sole power to construe and apply this Agreement and their construction and application of the same reasonably arrived at in good faith shall be final and conclusive.

(j) In the event of a deadlock resulting from the failure of the Employer and Union Trustees to agree on a matter relating to the administration of the Fund, then and in that event, the Trustees shall appoint an impartial Umpire to decide such dispute and upon the failure of the Trustees to agree within a reasonable length of time upon the selection of an impartial Umpire, either the Employer or Union Trustees may petition the United States District Court for the Eastern District of New York for the appointment of such impartial Umpire.

Booklet of Annuity Plan of the Electrical Industry

(R. pp. 53-67)

(See opposite)

3. *Trustees:*

(a) The four (4) Employer Trustees shall be:
HAROLD A. WEBSTER
EFREM A. KAHN
SIDNEY P. LIPKINS
J. M. WATTERS, JR.

(b) The four (4) Union Trustees shall be:
HARRY VAN ARSDALE JR.
JEREMIAH P. SULLIVAN
ALBERT J. MACKIE
EDWARD J. CLEARY

The Public Member shall be HAROLD HARPER.

(c) The Trustees named in the foregoing subdivisions (a) and (b) hereby accept the trust created and established herein, and consent to act as Trustees therefor, and declare that they will administer the said Trust. The signature of a Trustee to any counterpart or copy of this Agreement and Declaration of Trust shall be conclusive evidence of his acceptance as aforesaid.

(d) Each Trustee above named and each successor Trustee shall continue to serve as such until his death, incapacity or resignation.

(e) A Trustee may resign and become fully discharged from all further duty or responsibility hereunder upon giving ten (10) days' notice in writing to the remaining Trustees or such shorter notice as the remaining Trustees may accept as sufficient, in which notice there shall be stated a date when such resignation shall take effect; and such resignation shall take effect on the date specified in the notice unless a successor Trustee shall have been appointed at an earlier date, in which event such resignation shall take effect immediately upon the appointment of such successor Trustee.

(f) Any successor Employer Trustee or any successor Union Trustee shall immediately upon his

designation as a successor Trustee and his acceptance of the trusteeship in writing, filed with the Trustees, become vested with all the property rights, powers and duties of a Trustee hereunder with like effect as if originally named as a Trustee and all the Trustees then in office and all other parties shall immediately be notified.

4. *Contributing Employers:* All Employers, whose Employees are represented by Local Union #3 performing the work of Journeymen Electricians; Fifth, Fourth, Third, Second and First Year Apprentices; Motor Repair; Armature Winding; Routemen and Trouble Shooters; Superintendents; Electrical Street Lighting Employees; Marine Electrical Employees; Electrical Elevator Men; Electrical Expediters and Electrical Stock Clerks or other employees represented by Local Union #3 performing other classifications of work who may be admitted to this Plan, shall be deemed contributing employers.

In addition, Local Union #3 insofar as its officers, business representatives and the editor of the Union newspaper are concerned, and the Joint Industry Board of the Electrical Industry insofar as its employees are concerned who shall be covered by this Annuity Plan shall be deemed to be Contributing Employers provided that Local Union #3 and the Joint Industry Board of the Electrical Industry as Contributing Employers make the required contributions as Employers on behalf of their Employees who are covered under the Annuity Plan and satisfy the requirements for Participants as established by the Employer and Union Representatives (collectively referred to as "The Trustees") and agree to be bound by the terms and conditions of this Annuity Plan.

5. *Employer Contributions:* All contributions shall be determined as follows:

Booklet of Annuity Plan of the Electrical Industry

(R. pp. 53-67)

(See opposite).

(a) For the duration of the present collective bargaining agreement between the employer and the Union and any renewal or extension thereof covering Journeymen Electricians; Fifth, Fourth, Third, Second and First Year Apprentices; Motor Repair; Armature Winding; Routemen and Trouble Shooters; Superintendents; Electrical Street Lighting Employees and Marine Electrical Employees, each electrical contractor shall pay into the Annuity Fund the sum of Four Dollars ($4.00) per day for each day worked or each holiday for which payment is received by each employee who is a participant of this Annuity Plan.

Local Union #3 and the Joint Industry Board of the Electrical Industry shall likewise pay into the Annuity Fund the sum of Four Dollars ($4.00) per day for each day worked or each holiday on behalf of the officers, business representatives, editor of the Union newspaper and the employees of the Joint Industry Board who are participants of this Annuity Plan.

Every other employer admitted as an employer to this Annuity Plan shall pay into the Annuity Fund the sum of Four Dollars ($4.00) per day for each day worked or each holiday for which payment is received by his employees who are participants of this Annuity Plan or a fraction thereof. However, where the contributing employer contributes less than Four Dollars ($4.00) per day, the participant on whose behalf such contribution is made shall receive only a proportionate share of the benefits herein provided.

(b) The aforesaid Employer contributions under paragraph (a) hereof shall be credited to the individual account of each Participant but shall be payable to him only as hereinafter provided.

(c) Such contributions shall be forwarded weekly to the Trustees within one (1) week after each payroll period.

6. *Participants:* All employees represented by the Union for whom employers shall make contributions to this Annuity Plan shall be eligible to participate in this Annuity Plan and shall be participants.

In addition, the officers of Local Union #3, business representatives of Local Union #3, editor of Local Union #3 newspaper, the employees of the Joint Industry Board of the Electrical Industry, for whom Local Union #3 and the Joint Industry Board shall make contributions, shall be eligible to participate in this Annuity Plan and shall be participants.

Participants on whose behalf employers make contributions in amounts less than Four Dollars ($4.00) per day shall receive benefits proportionate to other participants.

7. *Benefits:* Each Participant of this Annuity Plan shall be entitled to receive the following benefits:

(a)(1) In the event that any Participant covered by this Annuity Plan should die between January 1, 1954 and December 31, 1954, both dates inclusive, then and in that event the designated beneficiary of such deceased Participant shall be paid the sum of One Thousand ($1,000.00) Dollars as a death benefit, out of income, if available, in monthly installments of One Hundred ($100.00) Dollars each.

(a)(2) In the event that any Participant who was covered by this Annuity Plan prior to January 1, 1956 should die on or after January 1, 1955, and on or before December 31, 1957, both dates inclusive, then and in that event the designated beneficiary of such deceased Participant shall be paid the sum of Two Thousand ($2,000.00) Dollars as a death benefit, out of income, if available, in monthly installments of One Hundred ($100.00) Dollars each.

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(R. pp. 53-67)

(See opposite)

(a)(3) In the event that a Participant of this Annuity Plan did not become a Participant until after January 1, 1956, and died on or before December 31, 1958 after he had one (1) year's continuous participation in the Annuity Plan, then and in that event the designated beneficiary of such Participant shall be paid the sum of One Thousand ($1,000.00) Dollars as a death benefit, out of income, if available, and should such Participant die after two (2) years continuous participation in the Annuity Plan, the designated beneficiary of such Participant shall be paid the sum of Two Thousand ($2,000.00) Dollars as a death benefit, in monthly installments of One Hundred ($100.00) Dollars each.

(a)(4) In the event that a Participant of this Annuity Plan should die on or after January 1, 1959, after he had one (1) year's continuous participation in the Annuity Plan, then and in that event the designated beneficiary of such Participant shall be paid the sum of One Thousand ($1,000.00) Dollars as a death benefit, out of income, if available, and should such Participant die after two (2) years continuous participation in the Annuity Plan, the designated beneficiary of such Participant shall be paid the sum of Three Thousand ($3,000.00) Dollars as a death benefit, out of income, if available, in monthly installments of One Hundred ($100.00) Dollars each. This provision shall be retroactive to January 1, 1959.

(a)(5) In the event a Participant of this Annuity Plan should die on or after January 1, 1962, after he had one (1) year's continuous participation in the Annuity Plan, then and in that event the designated beneficiary of such Participant shall be paid the sum of One Thousand ($1,000.00) Dollars as a death benefit out of income, if available, and should such Participant die after two (2) years continuous participation in this

Annuity Plan, then and in that event the designated beneficiary of such Participant shall be paid the sum of Four Thousand ($4,000.00) Dollars as a death benefit out of income, if available, in monthly installments of One Hundred ($100.00) Dollars each.

(a)(6) In the event a participant of this Annity Plan should die on and after January 1, 1964, after he had one (1) year's continuous participation in the Annuity Plan, then and in that event the designated beneficiary of such Participant shall be paid the sum of One Thousand ($1,000.00) Dollars as a death benefit out of income, if available, and should such Participant die after two (2) years continuous participation in this Annuity Plan, then and in that event the designated beneficiary of such participant shall be paid the sum of Five Thousand ($5,000.00) Dollars as a death benefit out of income, if available, in monthly installments of One Hundred ($100.00) Dollars each. This provision shall be retroactive to January 1, 1964.

(b) In the event that a Participant should die, the designated beneficiary of such Participant, in addition to the death benefits set forth above in subdivision (a), shall receive all monies to the credit of the account of such Participant, in monthly installments of One Hundred ($100.00) Dollars each.

(c) Commencing July 1, 1964, all payments to designated beneficiaries whether payment of death benefits or equity shall be increased from One Hundred ($100.00) Dollars per month to One Hundred and Twenty-five ($125.00) Dollars per month.

(d)(1) In the event that any Participant should retire from the industry at the age of sixty (60), or over, on or after April 1, 1959 and before July 1, 1961 or become permanently disabled after such Participant has been employed by a contribut-

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(See opposite)

ing Employer or available for employment at least ten (10) years prior to his permanent disability, such Participant shall be entitled to receive the sum of Seventy-five ($75.00) Dollars per month until the monies credited to such Participant's account have been exhausted.

(d)(2) In the event that any Participant should retire from the industry at the age of sixty (60), or over, on or after July 1, 1961 and before July 1, 1963 or become permanently disabled after such Participant has been employed by a contributing Employer or available for employment at least ten (10) years prior to his permanent disability, such Participant shall be entitled to receive the sum of One Hundred ($100.00) Dollars per month until the monies credited to such Participant's account have been exhausted.

(d)(3) In the event that any Participant should retire from the industry at the age of sixty (60), or over, on and after July 1, 1963 and before January 1, 1965 or become permanently disabled after such Participant has been employed by a contributing Employer or available for employment at least ten (10) years prior to his permanent disability, such Participant shall be entitled to receive the sum of One Hundred and Twenty-five ($125.00) Dollars per month until the monies credited to such Participant's account have been exhausted.

(d)(4) In the event that any Participant should retire from the industry at the age of sixty (60), or over, on or after January 1, 1965, or in the event that any Participant should retire at the age of fifty-eight (58) years or over on or after July 1, 1965, or become permanently disabled, after such Participant has been employed by a contributing Employer or available for employment at least ten (10) years prior to his permanent disability, such Participant shall be entited to receive the sum of One Hundred Fifty ($150.00) Dollars per

month until the monies credited to such Participant's account have been exhausted.

(e)(1) In the event that a retired Participant or a permanently disabled Participant who has been employed by a contributing Employer or available for employment at least ten (10) years should die on or after January 1, 1962 and before January 1, 1964 then and in that event the balance accumulated in such Participant's account shall be paid to such Participant's designated beneficiary in monthly installments of One Hundred ($100.00) Dollars each.

(e)(2) In the event a retired Participant or a permanently disabled Participant who has been employed by a contributing Employer or available for employment at least ten (10) years should die on or after January 1, 1964 then and in that event the balance accumulated in such Participant's account shall be paid to such Participant's designated beneficiary in monthly installments of One Hundred ($100.00) Dollars each up to July 1, 1964 and in monthly installments of One Hundred and Twenty-five ($125.00) Dollars thereafter.

In addition, upon the death of any retired Participant or a Participant who has been permanently disabled after such Participant has been employed by a contributing Employer or available for employment at least ten (10) years prior to his permanent disability, the Annuity Plan shall pay the designated beneficiary of such Participant, out of income, if available, the following death benefits:

One (1) year's continuous participation	$500.00
More than one (1) year's continuous participation and up to and including two (2) years participation	$750.00
More than two (2) years continuous participation and up to and including three (3) years participation	$1,000.00

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(See opposite)

More than three (3) years continuous participation and up to and including four (4) years participation $1,250.00
More than four (4) years continuous participation and up to and including five (5) years participation $1,500.00
More than five (5) years continuous participation and up to and including six (6) years participation $1,750.00
More than six (6) years continuous participation and up to and including seven (7) years participation $2,000.00
More than seven (7) years continuous participation and up to and including eight (8) years participation $2,250.00
More than eight (8) years continuous participation and up to and including nine (9) years participation $2,500.00
More than nine (9) years continuous participation and up to and including ten (10) years participation $2,750.00
More than ten (10) years continuous participation and up to and including eleven (11) years participation $3,000.00
More than eleven (11) years continuous participation and up to and including twelve (12) years participation.....$3,250.00
More than twelve (12) years continuous participation and up to and including thirteen (13) years participation $3,500.00
More than thirteen (13) years continuous participation $3,750.00

in monthly installments of $100.00 each up to July 1, 1964, and in monthly installments of $125.00 each thereafter.

(e)(3) In the event that a retired Participant should return to the employ of a contributing Employer, such Participant shall be deemed to be

a new Participant as of the date of his return to employment, and should such Participant die before he became entitled to the maximum death benefit as provided in paragraph 7(a) of this Annuity Plan, his designated beneficiary shall receive a sum not to exceed the amount of death benefit as provided in paragraph 7(a) of this Annuity Plan, nor less than the amount set forth in paragraph 7(e)(1) and 7(e)2 of this Annuity Plan.

(f)(1) In the event that a Participant should become permanently disabled (who has not been employed by a contributing Employer or available for employment for ten (10) years or more) cease to be a Participant or enter the Armed Forces of the United States before January 1, 1965, then such Participant shall cease to be covered by this Annuity Plan and he shall be entitled to receive the sum of Fifty ($50.00) Dollars per month until the monies credited to such Participant's account have been exhausted and such Participant shall receive no other benefits.

(f)(2) In the event that a Participant should become permanently disabled (who has not been employed by contributing Employer or available for employment for ten (10) years or more) cease to be a Participant or enter the Armed Forces of the United States on and after January 1, 1965, then such Participant shall cease to be covered by this Annuity Plan and he shall be entitled to receive the sum of Sixty ($60.00) Dollars per month until the monies credited to such Participant's account have been exhausted and such Participant shall receive no other benefits.

(f)(3) In the event that such former Participant should die before July 1, 1964, before he has exhausted his account, then and in that event, the balance accumulated in such former Participant's account shall be paid to such deceased's beneficiary

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(R. pp. 53-67)

(See opposite)

in monthly installments of One Hundred ($100.00) Dollars each.

Commencing July 1, 1964 the aforesaid monthly installments shall be increased to One Hundred Twenty-five ($125.00) Dollars per month.

(g) The Trustees annually will review the amount of income available for the payment of death benefits and if, in their opinion, such monies are in excess of those necessary to pay the death benefits provided hereunder, the Trustees beginning May 1, 1965 shall declare an annual dividend in such amount as they may determine, which monies shall be credited annually proportionately to the principal of each Partcipant's account.

8. *Termination:*

(a) The Annuity Plan of the Electrical Industry shall be terminated when there is no longer in force an agreement between the Employer and the Union requiring Employer contributions to the said Annuity Fund for the purposes herein provided. The Annuity Fund may, likewise, be terminated at any time by the unanimous vote of all Trustees with the consent of the Employer and the Union.

(b) In the event of the termination of the Annuity Fund, the Trustees shall apply the Fund to pay or provide for the payment of any and all obligations of the said Trust and distribute and apply any remaining surplus in such manner as will in their opinion, best effectuate the purpose of the said Trust; provided, however, that no part of the corpus or income of said Trust shall be used for or diverted to purposes other than the exclusive benefit of the Participants, or the administrative expenses of the Annuity Fund, or for other payments in accordance with the provisions of the Annuity Plan.

(c) Upon termination of the Annuity Fund the

Trustees shall forthwith notify the Employer, the Union and all other necessary parties and shall continue as Trustees for the purpose of winding up the affairs of the Trust.

9. *General Provisions:*

(a) The Trustees shall make such rules and regulations as may be necessary for the proper administration and operation of this Annuity Plan.

(b) All forms required for the administration of this Plan, including the weekly reports to be made by the Employers with accompanying contributions, as well as forms on which Participants shall designate beneficiaries, shall be prepared by the Trustees and supplied to the Employers and Participating employees.

(c) No person claiming by or through any Participant by reason of having been named as beneficiary in a certificate, or otherwise, nor any contributing Employer, nor the Union, or any other person, partnership, corporation or association shall have any right, title or interest in or to the Annuity Fund or any part thereof. Under no circumstances shall any amount contributed by the Employers revert to them, or any of them.

(d) The Trustees shall have the power to demand, collect and receive Employer payments and shall hold such monies as part of the Annuity Fund for the purposes specified in this Agreement. All suits and proceedings to recover Employer payments, or to enforce or protect any other right, demand or claim in behalf of the Trustees or of the Annuity Fund, may be instituted and prosecuted on behalf of the Annuity Fund and the Trustees by the Chairman in his capacity, as such, or by any two (2) Trustees, one (1) of whom shall be an Employer Trustee and the other of whom shall be a Union Trustee thereunto authorized by the Trustees.

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(R. pp. 53-67)

(See opposite)

(e) The decision of a majority of the Trustees shall be final in all matters requiring administrative action.

(f) The benefits payable to Participants or beneficiaries under this Plan cannot be assigned and shall not be liable to attachment, garnishment or other process, and shall not be taken, appropriated or applied by any legal or equitable process, or by operation of law, to pay any debt or liability of the Participant or of any beneficiary or next-of-kin who may have a right thereunder, either before or after payment.

(g) Upon the failure of a Participant to name and/or designate a beneficiary or beneficiaries the benefits shall be payable in the following order of priority.

(A) to surviving spouse;
(B) children of the deceased Participant;
(C) father of the deceased Participant;
(D) mother of the deceased Participant;
(E) brothers and sisters of the deceased Participant;
(F) personal representative of the deceased Participant's estate.

Where, under this section, benefits become payable to a person who is under twenty-one (21) years of age, the amount may be paid to such persons — without requiring the appointment of a guardian — by paying such amount to anyone over the age of twenty-one (21) years who submits satisfactory proof that he or she is supporting and maintaining such person and gives assurance to the Plan in satisfactory form that the monies paid over will be used for such purposes.

(h) This Agreement may be amended at any time or from time to time by the Trustees, with the consent of the Employer and the Union, except that no amendment shall divert the Fund as then constituted or any part thereof for any purposes other than stated in this Agreement.

IN WITNESS WHEREOF, the parties hereto have hereunto affixed their hands and seals the 1st day of August, 1964.

NEW YORK ELECTRICAL CONTRACTORS' ASSOCIATION, INC.
Sidney P. Lipkins, *President*

MASTER ELECTRICAL CONTRACTORS' ASSOCIATION, INC.
Felix Hirsch, *President*

GREATER CITY ELECTRICAL CONTRACTORS' ASSOCIATION, INC.
Joseph Coletta, *President*

ASSOCIATION OF ELECTRICAL CONTRACTORS' INC.
A. David Yadlovker, *President*

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
Edward J. Cleary, *President*

Employer Trustees	*Union Trustees*
Harold A. Webster	Harry Van Arsdale Jr.
Efrem A. Kahn	Jeremiah P. Sullivan
Sidney P. Lipkins	Albert J. Mackie
J. M. Watters Jr.	Edward J. Cleary

IN THE

Supreme Court of the United States

October Term, 1967

No. 616

In the Matter

of

A & S ELECTRIC CORP., Bankrupt,

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY and WARREN C. SCHWARTZ, Trustee in Bankruptcy of A & S ELECTRIC CORP.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HAROLD STERN,
70 Pine Street,
New York 5, New York,
Attorney for Petitioners.

HAROLD STERN,
NORMAN ROTHFELD,
of Counsel.

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Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 22, 1967.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit affirming the order of the United States District Court for the Eastern District of New York, dated November 4, 1966, is recorded in 378 F. 2d — and printed in the appendix to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented

1. Whether employer payments to the Annuity Fund of The Electrical Industry, all of which are earmarked and credited to the individual accounts of named workmen, are entitled to the priority accorded to "wages * * * due to workmen" within the meaning of Section 64a(2) of the Bankruptcy Act.

Statement

This case affects the fiscal integrity of all employee benefit Trust Funds which provide for full and immediate vesting to named employees.

Directly concerned is the Annuity Plan of the Electrical Industry, which through the Joint Industry Board of the Electrical Industry filed a claim on behalf of forty of its named employ participants for $5,114 unpaid contributions, claiming priority status as "wages * * * due to workmen" under Section 64a(2) of the Bankruptcy Act, 70 Stat. 725 (1956), 11 U.S.C. Sec. 104a(2).

The Referee in Bankruptcy, the United States District Court for the Eastern District of New York, and the court below, all ruled that the claim must be denied a wage priority under the Supreme Court's decision in *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29 (1959).

Embassy Restaurant concerned employer contributions to a Welfare Fund, which were applied to purchase insurance policies to provide medical and other benefits to unidentified employees.

Since the Supreme Court's decision in *Embassy Restaurant*, employers have bargained collectively to contribute, and have contributed, many billions of dollars to Funds which provide workmen with fixed and vested benefits. The Annuity Plan of the Electrical Industry alone has collected more than $100,000,000.

In 1962, the United States Court of Appeals for the Ninth Circuit, in *Sulmeyer* v. *Southern California Pipe Trades Trust Fund*, 301 F. 2d 768, distinguishing *Embassy Restaurant*, granted a wage priority to contributions to a Vacation and Holiday Benefit Fund. Without conceding the validity of the rationale of *Sulmeyer*, and without conceding a conflict, the court below distinguished *Sulmeyer* from the instant case upon grounds which were not discussed by the Supreme Court in *Embassy Restaurant*.

The interest of the United States as respondent arises from the fact that if the claim of the Joint Industry Board is paid, the Federal tax claim will not be paid in full. Very frequently, in fact, bankrupt estates do not contain sufficient funds to satisfy both wage claims and tax claims.

Reasons for Granting the Writ

1. The decision of the court below is substantially in conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *Sulmeyer* v. *Southern California Pipe Trades Trust Fund*, 301 F. 2d 768. The court below did not concede the conflict. The court below distinguished *Sulmeyer* on the grounds that:

a. "it rested on the facts that vacation pay had already been held entitled to a wage priority, see, e.g. United States v. Munro-Van Helms Co., Inc., 243 F. 2d 10 (5 Cir. 1957),"

b. "that taxes were withheld from employees on contributions to the Fund", and

c. "that the Fund established a separate savings account for each employee".

With respect to these distinctions:

a. *Munro-Van Helms* concerns vacation pay paid directly to the employees, with priority limited to one-fourth of the annual vacation pay, and is therefore not applicable to claims filed by trust funds.

b. This court in *Embassy Restaurant* did not concern itself with whether income taxes were withheld from employees on contributions to the Fund. Sec. 64a(2) was enacted in 1841 (c. 9, 5 Stat. 444), long prior to the laws requiring withholding of income taxes. We respectfully urge that the Congress which enacted Section 64a(2) did not intend to deprive any claims of the status of wages because the payments were owing pursuant to an arrangement made to postpone and minimize taxes. "Wages * * * due to workmen" should not be construed to read *wages due to workmen provided, however, that the United States collects some of these wages first.*

c. While the Annuity Plan did not establish a separate savings account for each of its more than 10,000 employee participants, it does substantially the same thing. The Annuity Plan sends to each participant a monthly statement setting forth the total contributions received on his behalf, together with the dividends currently added thereto. The statement sets forth each participant's total vested interest in the Annuity Plan.

2. Clearly, the question presented is of importance to millions of workmen, who work for employers which may be adjudicated bankrupt or may file Chapter XI proceedings.

Unquestionably, employees desire the security provided them by a Trust Fund which provides vested benefits. Such a Fund, however, finds it more difficult in the event of a bankruptcy to replace the contributions which the employer failed to make, than a pooled welfare fund the assets of which are transferable at the discretion of the trustees.

Urgently required, therefore, is a decision which makes clear that *Embassy Restaurant* was intended to apply only to Health and Welfare Funds and was not intended to apply to Funds providing vested rights and fixed benefits. Furthermore, with respect to those industries in which a significant number of bankruptcies may occur, the fiscal integrity of the employee trust funds will be impaired by the decision of the court below. When an ailing industry fails to pay its taxes as a result of bankruptcy, other sectors of the economy can assume the tax burden; when contributions for vested and fixed employee benefits are unpaid, the employees must suffer.

3. The decision of the court below is believed to be erroneous and an unwarranted extension of the decision of this Court in *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29 (1959).

In support of its decision, the Court below relied, among other things, upon the fact that this Court observed in *Embassy Restaurant* that welfare fund contributions "offer no support to the workman in periods of financial distress". The court below noted that "all indications are that relatively few workers whose employers become bankrupt will permanently leave the electrical industry". While it is true that only eleven of the forty employees affected therein left the electrical industry and applied for their monthly payments, it may fairly be presumed that the balance of the employees chose not to leave the electrical industry because they did not suffer financial distress by remaining a part of that industry.

In this same connection, the court below observed that "allowing a wage priority to annuity claim contributions might well reduce the amount of unpaid wages" a worker would realize from bankruptcy, and would not increase the amount of benefit immediately payable under the Plan unless his account with the Plan was empty". The court below concluded that the Annuity Fund "does not afford a 'protective cushion' against the economic dislocation caused by an employer's bankruptcy". In fact, however, no wages payable directly to the electricians were owed to the electricians employed by the bankrupt, and the likelihood that Annuity Fund claims could reduce recovery of wage claims is largely theoretical. No employer in the construction field could long continue operations without meeting his payroll regularly. Obligations to trust funds, however, like obligations to the taxing authorities, are usually substantial whenever a bankruptcy petition is filed. Annuity Fund claims, rather than wage claims, must therefore be relied upon to provide the workman with a "protective cushion".

The court below, comparing the contributions payable in *Embassy Restaurant* with those in the instant case, attempted to show a similarity between the two Funds. As this court stated, the contributions to the Welfare Fund in *Embassy Restaurant* were "flat sums of $8.00 per month for each workman * * * without relation to his hours, wages or productivity" (359 U.S. at 32). Contributions to the Annuity Fund are at a flat rate of $4.00 for each day worked. Clearly, the latter contributions are related to the time worked, while the contributions in *Embassy Restaurant* were not related to the time worked, but were related solely to the calendar. Wages of workmen are, of course, customarily based upon the time worked.

The court below also cited this court's statement in *Embassy Restaurant* that "a workman cannot even compel payment by a defaulting employer" (359 U. S. at 32), as likewise expressing a significant characteristic of the

Annuity Plan. Since *Embassy Restaurant,* however, the courts have issued numerous decisions that provide substantial protection to employees with fixed benefits and vested rights in trust funds established on their behalf. With respect to the Annuity Plan, the very fact that this case has proceeded to this stage constitutes proof that the Trustees protect the rights of the employees at least as zealously as if each employee had instituted his own action against a defaulting employer.

The court below recognized the force of the arguments in favor of a wage priority when it stated:

> "It has been forcefully argued that contributions to funds like the Annuity Plan should receive a wage priority in bankruptcy. See, e.g., *United States* v. *Embassy Restaurant, Inc.,* 359 U.S. 29, 35 (1959) (Black, J., dissenting); Note. Union Retirement and Welfare Plans: Employer Contributions as 'Wages' Under Section 64a(2) of the Bankruptcy Act, 66 Yale L. J. 449, 460-61 (1957)",

but suggested that the argument be made to Congress. We respectfully urge that the aforesaid arguments apply to Funds with fixed benefits and vested rights *a fortiori.*

This Court in *Embassy Restaurant* (359 U.S. at 34, 38-39) discussed *Shropshire, Woodliff & Co.* v. *Bush,* 204 U.S. 186, and particularly the citation therein that "The [wage] priority is attached to the debt, and not to the person of the creditor.* * * ", and held that the application of this principle did not help the legal position of the Welfare Fund. We respectfully urge that the *Shropshire* principle is nevertheless applicable to the Annuity Fund herein. The Ninth Circuit in *Sulmeyer* applied the *Shropshire* principle to the Vacation and Holiday Fund therein, and stated:

> "The facts of this case bring it into closer alignment to the 'assigned wage claim' cases than to Embassy Restaurant, supra". (301 F. 2d at 77).

This court has authority to deviate from the priorities set forth in the Bankruptcy Act in the interests of justice and equity. (*Sampson* v. *Imperial Paper Corp.*, 313 U.S. 215). What principle of equity preserves the right of a speculator who purchases wage claims in quantity, or the right of a surety through subrogation (*Home Indemnity Corp.* v. *F. H. Donovan Painting Co.*, C.A. 8, 1963, 325 F. 2d 870) to enforce priority wage claims, yet denies that same right to trustees who are conserving wages pursuant to a government approved (I.R.C., Section 401) plan?

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD STERN,
70 Pine Street,
New York, New York 10005,
Attorney for Petitioners.

HAROLD STERN,
NORMAN ROTHFELD,
of Counsel.

APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 355—September Term, 1966.

(Argued April 11, 1967 Decided June 22, 1967.)

Docket No. 30992

In the Matter

of

A & S ELECTRIC CORP.,

Bankrupt,

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY and WARREN C. SCHWARTZ, Trustee in Bankruptcy of A & S ELECTRIC CORP.,

Appellants.

Before:

LUMBARD, *Chief Judge,*
SMITH and FEINBERG, *Circuit Judges.*

Appeal from an order in the Chapter XI proceeding of A & S Electric Corp., in the Eastern District of New York, George Rosling, *J.*, denying wage priority status to a claim for unpaid contributions to an Annuity Plan.

Affirmed.

WARREN C. SCHWARTZ, Brooklyn, New York, *Trustee in Bankruptcy for A & S Electric Corp.*

HAROLD STERN, New York, N. Y. (Norman Rothfeld, New York, N. Y., on the brief), *for Joint Industry Board of the Electrical Industry, appellant.*

HOWARD M. KOFF, Department of Justice, Washington, D. C. (Richard C. Pugh, Acting Assistant Attorney General, Lee A. Jackson and Joseph Kovner, Department of Justice, Washington, D. C., and Joseph P. Hoey, United States Attorney for the Eastern District of New York, Brooklyn, New York, and Frank R. Natoli, Assistant United States Attorney, Brooklyn, New York, on the brief), *for the United States.*

LUMBARD, *Chief Judge*:

The Joint Industry Board of the Electrical Industry, which administers an Annuity Plan funded by employer contributions under a collective bargaining agreement between Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, and four associations of electrical contractors in New York City, appeals from an order of Judge Rosling, affirming an order of Referee Warner in the Chapter XI proceeding of A & S Electric Corp. in the Eastern District of New York, denying priority status as "wages . . . due to workmen" under section 64a(2) of the Bankruptcy Act, 70 Stat 725 (1956), 11 U. S. C. § 104a(2), to the Joint Industry Board's claim for unpaid contributions of $5114 to the Annuity Plan. We agree with Judge Rosling that this claim must be denied a

wage priority under the Supreme Court's decision in *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29 (1959), and we affirm his order.

The Annuity Plan of the Electrical Industry, as amended to July 1, 1964, requires each employer of workers represented by Local Union No. 3 to contribute $4.00 for each day's wages paid to each such worker. Each worker for whom such contributions are made becomes a Participant in the Plan, and he or his designated beneficiary is entitled to receive monthly payments of specified amounts, until the sums credited to his account are exhausted, upon his death, retirement from the industry at age sixty or over, permanent disability after working more than ten years for a contributing employer, or ceasing to be a Participant for any other reason. In addition, the beneficiary of a deceased Participant is entitled to death benefits out of the income of the Plan, if available, the amount varying with the length of his continuous participation in the Plan. The benefits payable under the Plan are expressly made non-assignable, and immune from attachment, garnishment, or other process. The trustees are authorized to invest and reinvest the funds of the Plan "in their sole discretion," and are made liable only for losses "due to their wilful misconduct or fraud."

Like the welfare fund contributions which the Supreme Court denied a wage priority in *United States* v. *Embassy Restaurant, Inc., supra,* contributions to the Annuity Plan "are not 'due to workmen,' nor have they the customary attributes of wages." 359 U. S. at 33. The contributions in *Embassy Restaurant* were "flat sums of $8 per month for each workman . . . without relation to his hours, wages or productivity," 359 U. S. at 32; contributions to the Annuity Plan are likewise at a flat rate of $4.00 for each day's wages. Moreover, as in *Embassy Restaurant,* the contributions are payable directly to the trustees of the Annuity Plan, who are vested with exclusive management of its funds; so far as the record shows, "a workman can-

not even compel payment by a defaulting employer." 359 U. S. at 32; cf. *Local 140 Security Fund* v. *Hack*, 242 F. 2d 375 (2 Cir.), cert. denied, 355 U.S. 833 (1957).

The Court also observed in *Embassy Restaurant* that the congressional purpose in enacting the wage priority was "to provide the workman a 'protective cushion' against the economic displacement caused by his employer's bankruptcy," and that the welfare fund contributions, which were applied to life insurance, sick benefits, and hospital and surgical plans,

> "offer no support to the workman in periods of financial distress. Furthermore, if the claims of the trustees are to be treated on a par with wages, in a case where the employer's assets are insufficient to pay all in the second priority, the workman will have to share with the welfare plan, thus reducing his own recovery." 359 U. S. at 33-34.

The Joint Industry Board argues that the Annuity Plan does offer support to its Participants in periods of financial distress, because a worker who permanently ceases to be employed in the electrical industry ceases to be a Participant and is entitled to fixed monthly benefits. However, all indications are that relatively few workers whose employer becomes bankrupt will permanently leave the electrical industry. Moreover, the monthly benefits paid to a worker withdrawing from the electrical industry are fixed at $50.00 or (for workers leaving after January 1, 1965) $60.00 a month. Thus allowing a wage priority to Annuity Plan contributions might well reduce the amount of unpaid wages a worker could realize from bankruptcy, and would not increase the amount of benefits immediately payable under the Plan unless his account with the Plan was empty. The Annuity Plan therefore does not afford a meaningful "protective cushion" against the economic dis-

location caused by an employer's bankruptcy, and cannot be accorded a wage priority under *Embassy Restaurant.*[1]

It has been forcefully argued thta contributions to funds like the Annuity Plan should receive a wage priority in bankruptcy. See, e.g., *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29, 35 (1959) (Black, *J.*, dissenting); Note, Union Retirement and Welfare Plans; Employer Contributions as "Wages" Under Section 64a(2) of the Bankruptcy Act, 66 Yale L. J. 449, 460-61 (1957). But in light of the Supreme Court's decision in *Embassy Restaurant,* such an argument must be made to Congress, not to this court.

Affirmed.

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[1] The Joint Industry Board also relies on *Sulmeyer* v. *Southern California Pipe Trades Trust Fund,* 301 F. 2d 768 (9 Cir. 1962), which granted a wage priority to contributions to a Vacation and Holiday Benefit Fund. But that decision is clearly distinguishable in any event, as it rested on the facts that vacation pay had already been held entitled to a wage priority, see, e.g., *United States* v. *Munro-Van Helms Co., Inc.*, 243 F. 2d 10 (5 Cir. 1957), that taxes were withheld from employees on contributions to the Fund, and that the Fund established a separate savings account for each employee.

SUPREME COURT, U. S.

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No. 643

In the Supreme Court of the United States

OCTOBER TERM, 1967

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY AND WARREN C. SCHWARTZ, TRUSTEE IN BANKRUPTCY OF A & S ELECTRIC CORP., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

RICHARD C. FUSE,
Acting Assistant Attorney General,

GEORGE J. D. GRAUER,
EDWARD H. HOFF,
Attorneys,

Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 616

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY AND WARREN C. SCHWARTZ, TRUSTEE IN BANKRUPTCY OF A & S ELECTRIC CORP., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question involved is whether unpaid employer contributions to a union retirement fund have priority under the Bankruptcy Act over the government's claim for unpaid taxes. Relying on this Court's decision in *United States* v. *Embassy Restaurant*, 359 U.S. 29, the court below held that these contributions do not fall within the purview of "wages * * * due to workmen," as that phrase is employed in Section 64(a)(2) of the Bankruptcy Act, c. 541, 30 Stat. 544, 563, as amended (11 U.S.C. 104). This decision is plainly correct, and there is no conflict or other basis for further review.

281-084—67

This case is indistinguishable from and is fully controlled by *Embassy*. The contributions here, as there, offered no meaningful support to the participating employee during periods of economic displacement. Hence, they did not satisfy the purpose underlying the priority the Bankruptcy Act gives wages: "That purpose was to provide the workman a 'protective cushion' against economic displacement caused by his employer's bankruptcy." 359 U.S., p. 33. Further, as this Court recognized in *Embassy*, the wage priority statute is concerned with debts due directly to employees. The debtor-creditor relationship here, as in *Embassy*, was between the employer and third parties—the trustees of the fund. The employees were never entitled to enforce the employer's obligations, and they never had any right, title or interest in the fund other than in relation to their eligibility for such benefits as might be established upon their retirement. (R. 53a.)* These are quite different from the type of employer-employee debt that the Bankruptcy Act contemplates would, through a priority, give employees economic assistance during the short-term dislocation that arises from the employer's bankruptcy.

There is not, as petitioner contends (Pet. 3–4), a conflict between the decision below and the decision of the Court of Appeals for the Ninth Circuit in *Sulmeyer* v. *Southern California Pipe Trades Trust Fund*, 301 F. 2d 768. In *Sulmeyer* the contributions were to a Vacation and Holiday Benefit Fund in the

* "R." refers to the appendix to the brief for the appellant in the court of appeals.

amount of seven and one-half percent of the gross pay of each participating employee. Thus, unlike the present case, no flat sum was involved; rather, the contributions varied directly according to wages and hours worked. Moreover, the contributions in *Sulmeyer* were placed in savings accounts in the names of individual employees and were paid over to the employees on a semi-annual basis. The contributions thus provided each employee with the "protective cushion" against economic displacement that this Court found lacking in *Embassy*.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD C. PUGH,
Acting Assistant Attorney General.

CROMBIE J. D. GARRETT,
HOWARD M. KOFF,
Attorneys.

NOVEMBER 1967.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 616

In the Matter of

A & S ELECTRIC CORP., Bankrupt,

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY and WARREN C. SCHWARTZ, Trustee in Bankruptcy of A & S ELECTRIC CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR THE TRUSTEE IN BANKRUPTCY OF A & S ELECTRIC CORP. BANKRUPT

MAX SCHWARTZ,
26 Court Street,
Brooklyn, New York,
Attorney for Trustee.

MAX SCHWARTZ,
WARREN C. SCHWARTZ,
of Counsel.

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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR THE TRUSTEE IN BANKRUPTCY OF A & S ELECTRIC CORP. BANKRUPT

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is recorded in 378 F. 2d 211 (1967).

Jurisdiction

The jurisdiction of this court has been invoked under Title 28, United States Code, Section 1254 (1).

Question Presented

Whether employer contributions to a union annuity fund, pursuant to a collective bargaining agreement, which are credited in full to the individual accounts of the employees, are wages entitled to priority under § 64 a (2) of the Bankruptcy Act?

Statute Involved

Bankruptcy Act, c 541, 30 Stat. 544, 11 U.S.C. 104:

> Sec. 64, Debts Which Have Priority. a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be * * * (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, * * *; (4) taxes which became legally due and owing by the bankrupt to the United States.

Statement

A & S Electric Corp. filed a petition under Chapter XI, section 322, on January 9, 1963, and was adjudicated a bankrupt on November 6, 1963.

During the pendency of the Chapter XI proceedings, the Joint Industry Board of the Electrical Industry filed a proof of claim for the total sum of $10,537.34 (R45a-R49a).[1] This was the only priority wage claim filed in the proceeding.

The United States, by Director of Internal Revenue, Brooklyn, N.Y., filed a proof of claim for internal revenue taxes owing in the sum of $15,587.55 (R27a).

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[1] "R." references are to the Appendix to the brief of the Joint Industry Board of the Electrical Industry to the Court of Appeals.

The trustee and the Joint Industry Board of the Electrical Industry entered into a stipulation whereby they agreed to allow the claim of the Joint Industry Board for contributions owing to the Annuity Fund, in the sum of $5,114 as priority, and disposing of the balance of the claim which is not at issue here (R29a-30a). That said sum of $5,114 is the total amount owed to the annuity fund on the account of 39 workmen of the bankrupt and none of these accounts are owed in excess of $600 (R38a-R39a).

The Referee in Bankruptcy decided that the contribution to the annuity fund were not entitled to priority (R28a).

The assets in the hands of the trustee will be insufficient to pay both the claim of the Joint Industry Board and the Director of Internal Revenue, if the former claim is allowed as priority.

The Annuity Plan at issue is set forth in full in the appendix (R53a). The plan provides for a per diem contribution to the account of employees for each day worked (R53a, ¶ 5a), crediting these sums to account of individual workmen (R53a, ¶ 5b) ultimate payment to the workman upon retirement or death (R53a, ¶ 7 (a) (5), (6), (b), (c), (d) (1) (2) (3) (4)).

Summary of Argument

The issue presented is whether unpaid employer contributions to a union annuity fund, pursuant to a collective bargaining agreement, and payable to the individual accounts to the bankrupt's workmen constitute wages within the meaning of the Bankruptcy Act Section 64a (2). Relying upon *U.S.* v. *Embassy Restaurant Inc.*, and *Sulmeyer* v. *Southern California Pipe Trades Trust Fund,* we believe the contributions to the fund are wages.

ARGUMENT

The claim of the Joint Industry Board of the Electrical Industry on behalf of employee members for contributions due its Annuity Fund is entitled to priority under Section 64a(2) of the Bankruptcy Act.

The Bankruptcy Act section 64a (2) grants priority status to "wages . . . due to workmen." The act grants a special status to employees who have not been paid, in an attempt to assure the workingman payment for his services, prior to tax claims and other creditors.

This court has heretofore held that payments to a union welfare fund are not wages, within the meaning of § 64a (2) of the Bankruptcy Act, *U.S.* v. *Embassy Restaurant Inc.*, 359 U.S. 29 (1959). The court noted in *Embassy*,

a) the contributions were a flat sum per month, without relationship to the workmen's wages.

b) the workmen had no legal interest in the fund.

c) the agreement was enforcible solely by the trustees who had exclusive management of the funds.

d) the fund offered no support to workmen in periods of financial distress.

e) the agreement did not consider the contributions as wages.

The instant annuity fund is far different factually from the welfare fund in *Embassy Restaurant.*

1) The monies owed by the bankrupt are due on the account of individual workmen, computed on the number of days worked.

2) Each workman has an individual account with the fund.

3) The monies contributed are only for his benefit and are inviolate; they will be paid only to him or his estate.

4) The monies contributed are taxable. Taxes are not avoided but merely delayed until retirement, when the monies are paid to the employee, and then are fully taxable.

5) The fund is designed to pay employee's an annuity upon retirement. When the employee retires the contributions made on his behalf become payable. Thus providing income for his retirement years, when money is needed.

In *Sulmeyer* v. *Southern California Pipe Trades Trust Fund,* 301 F 2d 768 (9 Cir., 1962) the Court of Appeals held monies owed to a union vacation fund to be wages entitled to priority status. The amount due was a percentage of wages.' The trustees supervised the funds, but each workman's rights are fixed. The contributions made were after deduction for taxes.

The instant matter is identical with *Sulmeyer.* The amount of contributions is based upon days worked, rather than a percentage, the workmen's interest is fixed, though taxes are not immediately paid, the contributions are ultimately taxed when paid to the workmen.

Those fringe benefits cannot be looked upon as anything other than wages. They are clearly part of the agreed compensation between workmen and their employers. As such they are entitled to priority.

CONCLUSION

This court should reverse the order of the court below and should rule that the claim filed by the Joint Industry Board of the Electrical Industry on behalf of its participants in this annuity fund is entitled to priority under Section 64a(2) of the Bankruptcy Act.

Respectfully submitted,

MAX SCHWARTZ,
Attorney for Trustee in Bankruptcy of A & S Electric Corp. bankrupt.

Of Counsel:
MAX SCHWARTZ,
WARREN C SCHWARTZ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 616

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY and WARREN C. SCHWARTZ, Trustee in Bankruptcy of A & S ELECTRIC CORP.,

Petitioners,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

BRIEF FOR PETITIONERS

HAROLD STERN,
Joint Industry Board of the Electrical Industry,
Attorney for Petitioner,
70 Pine Street,
New York City.

Of Counsel:

HAROLD STERN
NORMAN ROTHFELD

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Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

BRIEF FOR PETITIONERS

Opinion Below

The Opinion of the United States Court of Appeals (R. 6)[1] is reported at 379 F. 2d 211.

Jurisdiction

The judgment of the Court of Appeals was entered June 22, 1967 (R. 4). The petition was filed September 14, 1967, and was granted December 4, 1967. The jurisdiction of this Court rests on 28 U. S. C. 1254(1) and Section 24 of the Bankruptcy Act, as amended.

[1] "R." references are to the Joint Appendix.

Question Presented

Whether employer payments to the Annuity Fund of the Electrical Industry, all of which are earmarked and credited to the individual accounts of named workmen, are entitled to the priority accorded to "wages * * * due to workmen" within the meaning of Section 64a(2) of the Bankruptcy Act.

Statute Involved

As of the dates involved in this case, the statute involved provided in pertinent part:

"Bankruptcy Act, c. 541, 30 Stat. 544:

> "Section 64 (as amended by Sec. 1 of the Act of June 22, 1938, c. 575, 52 Stat. 840, and Sec. 1 of the Act of July 30, 1956, c. 784, 70 Stat. 725). *Debts Which Have Priority.*—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be * * * (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, * * * ; (4) taxes legally due and owing by the bankrupt to the United States * * *."
>
> (11 U. S. C. 1964 ed., Sec. 104.)

Statement

Since 1954, pursuant to collective bargaining agreements with Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO (herein called "Local No. 3"), virtually all employers in the electrical construction industry in the New York area, including the A & S Electric Corp., contributed each week to the Annuity Fund on behalf of each employee the sum of $4.00 for each day worked, which sums have been credited to their individual accounts. Every month each employee receives a statement setting forth every payment made into his account and his balance in his account (R. 44).

On January 9, 1963, A & S Electric Corp., the bankrupt, filed its petition under Chapter XI, Section 322, for an arrangement and was adjudicated on November 6, 1963 (R. 23).

The Joint Industry Board of the Electrical Industry, an unincorporated association, filed its proof of claim, No. 4, in this proceeding for an indebtedness in a total amount of $10,537.34. That total sum included $5,114.00. which the bankrupt failed to pay claimant pursuant to the Annuity Plan of the Electrical Industry Agreement, and represents the total of $4.00. per day contributions for each day worked by each employee (R. 23). The said $5,114.00. was required to be credited as follows:

Social Security Number	*Name*	*Annuity*
115-18-1511	W. Bantel	$ 184.00.
104-28-3513	T. J. Cleary	190.00.
237-18-9084	A. M. Condrey	180.00.
129-14-0808	W. J. Conkling	188.00.
090-12-4690	M. J. Conlon	180.00.

Social Security Number	*Name*	*Annuity*
071-32-7765	J. J. Constantino	184.00.
085-32-1620	V. Cupola	160.00.
123-34-5496	F. Dellaquila	176.00.
074-20-9463	F. A. Dooner	188.00.
089-14-8404	J. J. Hanaford	128.00.
365-16-6616	G. A. Hester	Terminated
113-34-3428	E. A. Hoffman	204.00.
067-09-8572	W. Hoffman	80.00.
130-32-6461	P. Horacek	128.00.
415-20-7994	J. P. Jones	4.00.
076-34-1874	I. Katzman	180.00.
129-28-4306	D. R. Kimmel	204.00.
244-10-6897	L. M. Lawing	44.00.
156-18-1875	L. Lunau	112.00.
107-07-7008	E. McCarthy	132.00.
084- 8-9665	L. Micene	84.00.
086-16-6165	B. Miller	180.00.
099-23-4730	A. V. Newberry	48.00.
071-18-9186	C. Perlstein	128.00.
114-28-3247	J. Perretta	172.00.
085-36-4504	J. Ragozino	112.00.
073-34-8440	A. Reiss	192.00.
089-30-3542	E. Renzulli	180.00.
123-32-5000	M. Salzano	104.00.
119-32-5744	T. Scully	192.00.
101-07-6505	C. Sjoli	148.00.
110-28-0132	B. F. Stringfield	92.00.
085-34-3251	T. J. Watson	180.00.
123-20-1852	B. Wimpel	128.00.
126-30-2303	J. C. Ziegler	176.00.
051-18-1701	H. Hallums	100.00.
066-17-0791	C. Gibson	8.00.

Social Security Number	*Name*	*Annuity*
374-30-7364	J. R. Roberts	24.00.
076-22-6606	W. Beaman	12.00.
254-18-2408	M. Sims	8.00.
	Total	$5,114.00.

(R. 51-52). Rather than file 40 individual claims or obtain 40 individual assignments, the Joint Board included the said $5,114.00. in its single proof of claim.

The Government filed a proof of claim for internal revenue taxes in the arrangement proceeding in the amount of $15,587.55. The debtor-in-possession during the arrangement failed to pay certain taxes and supplemental statements of internal revenue taxes were filed in the amounts of $4,343.58 and $31.27 (R. 39).

On June 14, 1965, the trustee and Joint Industry Board entered into a stipulation, whereby they agreed, among other things, that the $5,114.00. would be allowed as a priority wage claim. The stipulation, together with a proposed order to approve it, was submitted for the signature of the Referee (R. 23).

The Referee decided that the $5,114.00. was not entitled to priority under Section 64a(2) of the Bankruptcy Act (R. 39). On appeal the United States District Court for the Eastern District of New York entered an order confirming the order of the Referee (R. 11). Upon appeal from this order the Court of Appeals affirmed (R. 6).

The pertinent facts relating to the operation of the Annuity Plan are not in dispute and are set forth in the affidavit of Harold Stern, Esquire, attorney for the Joint Industry Board (R. 43-48).

Pursuant to the provisions of the Annuity Plan every employee receives all the money credited to his individual account when he exercises any of the options provided in the Plan (R. 8, Annuity Booklet, pp. 11-13, 15-16). If he ceases to be a participant, he loses only the right to death benefits (Annuity Booklet, p. 15) which benefits are payable out of the available income earned by the Annuity Fund (R. 45-46, Annuity Booklet, pp. 9-11). If he waits until he retires or becomes disabled he receives his equity in monthly installments, plus dividends, and if he dies, his beneficiary is entitled to the monies credited to his account plus death benefits (R. 8).

No employee has ever been deprived nor can he be deprived of any of his equity in the Annuity Fund (R. 44, 46).

Summary of Argument

The question here is whether employer payments to the Annuity Fund of the Electrical Industry, all of which are earmarked and credited to the individual accounts of named workmen, are entitled to the priority accorded to "wages * * * due to workmen" within the meaning of Section 64a(2) of the Bankruptcy Act. The Courts below answered this question in the negative for the sole reason that the decision of this Court in *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29, 79 S. Ct. 554 (1959) was believed to be controlling.

We believe that the decision in *Embassy*, which concerned a Health and Welfare Fund, was not intended to be applied to pension funds. Pension funds, particularly funds qualified under Section 401 I. R. C., possess signif-

icant characteristics which entitle them to a wage priority under Section 64a(2) of the Bankruptcy Act. The Annuity Fund of the Electrical Industry, in addition to being a qualified Plan pursuant to Section 401 I. R. C., possesses special characteristics which entitle it to a wage priority.

ARGUMENT

The claim filed by the Joint Industry Board of the Electrical Industry on behalf of the participants in the Annuity Fund is entitled to a wage priority pursuant to Section 64a(2) of the Bankruptcy Act.

Every week the employers engaged in the electrical construction industry in the New York area remit to the Joint Board $4.00 for each day worked by every employee. These sums are credited to the individual employee's account. Every month each employee receives a statement setting forth the total contributions received in his behalf together with the interest currently added thereto—his total vested interest in the Annuity Fund.

Clearly, these sums possess the essential characteristics of wages. The receipt of these wages by the employee is postponed so long as the employee wishes it to be postponed. By ceasing to work for contributing employers he may "cease to be a Participant" at any time.

While an employee continues to be a Participant,

(a) the money is saved for his benefit;

(b) payment of income tax is deferred until he receives the money, which would usually occur when his annual income—and the tax rate—is low;

(c) upon his death his beneficiary receives the balance which remains credited to the deceased employee's account and a death benefit, earned by the Annuity Fund's investments.

Thus, the principal difference between money paid direct to the employee and placed by him in a savings account and money saved on his behalf in the Annuity Fund is the postponement of income tax liability and the income tax saving to the employee. Surely this legal tax benefit does not take these payments out of the category of "wages" for any purpose other than tax purposes.

Relying upon *United States* v. *Embassy Restaurant, Inc.*, the United States Court of Appeals affirmed the order of District Judge George Rosling, and held that the Joint Industry Board's claim for $5,114.00 is not entitled to a wage priority. The decisions below appear to be the only reported cases relating to employer payments made to a fund comparable to the Annuity Fund herein.

In *Embassy*, this Court denied wage priority to the claim of a Welfare Fund which was used to purchase life insurance, medical, surgical and other welfare benefits which could not assist any individual workman unless he became ill or died.

In order to establish that the Annuity Fund of the Electrical Industry possesses such substantial characteristics of wages that it is entitled to a wage priority under Section 64a(2) of the Bankruptcy Act, we here set forth reasons why this Court's decision in *Embassy*, relied upon by the courts below, is inapplicable to pension funds in general, and is inapplicable to the Annuity Fund *a fortiori*.

The employees covered by nearly all private pension funds now have such substantial interests in the deferred compensation which has been contributed in their behalf, that these contributions should be treated as wages under Section 64a(2). Were this Court so to find, it might well choose at least to limit the effect of *Embassy* to the type of fund involved in that case.

As a result of the changes brought about by collective bargaining, unilateral employer decisions and Federal regulations and recommendations which occurred after the date of this Court's decision in *Embassy,* most private pension plans now provide that the funds therein do belong to the employees.

The primary characteristic of pension plans that guarantees to employees their pension benefit is known as vesting.

> "Vesting is defined as a guarantee to the worker of a right or equity in a pension plan based on all or part of his accrued retirement benefits should his employment terminate before he becomes eligible for retirement benefits. If his rights are vested, the worker is entitled to a future retirement benefit when he reaches retirement age, regardless of where he may be at the time. Through vesting, a worker can build up retirement benefits from more than one employer." [2]

A study by the Bureau of Labor Statistics of 300 large collectively bargained pension plans in 1952 showed that only 25% of the plans had vesting; in 1958, the Bureau

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[2] "Labor Mobility and Private Pension Plans," United States Department of Labor, Bureau of Labor Statistics Bulletin No. 1407, at p. 11.

found that almost 60% of a similar group of negotiated plans had vesting. Since 1958, the trend toward adding a vesting provision to existing plans has continued, especially in bargained plans. In 1961, in the Bureau's study of private pension plans covering 15.6 million workers, vesting was provided by two out of three private pension plans covering three out of five workers.[3]

The Bureau predicts that private pension coverage "will continue to grow, possibly doubling from 1960 to 1980—a rate of increase substantially greater than the expected rate of increase in the labor force. Counteracting to some extent the mobility effects of the spread of pension plans is the trend towards liberalization and extension of vesting, early retirement, and portable pension credits. Furthermore, interest in special provisions, such as special early retirement, that alleviates displacements caused by technological and other change and plant shutdown, may be expected to increase."[4]

As of June 1966, private pension plan benefits were computable, at the 10 year service level, for almost three-fifths of the plans under study with vesting covering slightly more than half the workers. In more than four out of five plans, covering nine out of ten workers, vesting was possible with 15 years of service.[5]

In 1957, among 99 major pension plans under collective bargaining covering production workers, selected for summary by the Bureau of Labor Statistics, 57 had vesting

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[3] BLS Bulletin No. 1407, at p. 11.

[4] BLS Bulletin No. 1407, at p. 51.

[5] "Private Pension Plan Benefits," Bureau of Labor Statistics Bulletin No. 1485, p. 85.

provisions. By 1961, 19 of these provisions had been improved and 5 of the remaining plans added vesting provisions, and other plans reduced age or service requirements or both. By 1964, vesting provisions were again improved in 15 of these plans and age and service requirements were liberalized, or age requirements dropped completely, in other plans.[6]

With respect to salaried employees, between 1963 and 1965, normal retirement provisions were liberalized in more than one-half of the 50 major plans studied. 39 of these plans had vesting provisions, and only 17 of them had an age requirement for all workers.[7]

In 1965 the President's Committee on Corporate Pension Funds and other Private Retirement and Welfare programs reported to the President and recommended that the Internal Revenue Code be amended to require that all private pension plans, in order to qualify for favored tax treatment, "must provide some reasonable measure of vesting for the protection of employees." According to the President's Committee, "Vesting validates the accepted concept that employer contributions to pension plans represent 'deferred compensation', which the individual worker earns through service with his employer."[8]

As of August 1967, "Nearly all the older workers (between 50 and 64) now covered by pension plans are likely

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[6] "Recent Changes in Negotiated Pension Plans" and "Changes in Negotiated Pension Plans, 1961-64," Monthly Labor Review of the United States Department of Labor, Bureau of Labor Statistics, May 1962, pp. 528, 531 and October 1965, p. 1218.

[7] "Changes in Pension Plans for Salaried Employees," Monthly Labor Review, April 1966, p. 383.

[8] "Vesting of Private Pensions: Implications for Public Policy," Monthly Labor Review, March 1965, pp. 310-311.

to qualify for pension because most have completed the required 10, 15 or 20 years of credited service. Over one-third of the workers surveyed said they had already acquired vested rights to pension benefits. Workers without vested rights usually had enough years of credited service to qualify for a pension under most plans or were young enough to earn that service before reaching retirement age. Few workers of this age with this amount of service are separated from their jobs, even involuntarily, before retirement; nearly all are likely to qualify for pension."[9]

Terminations:

Unfortunately, the increase of private pension plans has been accompanied by "A marked upward trend in the frequency of pension plan terminations",[10] frequently due to funding difficulties and business dissolutions.

Each year since 1961, more than 15,000 bankruptcy cases involving businesses were commenced and terminated in the United States District Courts.[11] These bankruptcies presumably resulted in the termination of numerous pension plans. Statistics are unavailable.

Until 1962, the Internal Revenue Code contained no provision governing plan termination. In that year Section

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[9] "Private Pension Plan Coverage of Older Workers," Monthly Labor Review, August 1967, at p. 47.
53% of the older men and 28% of the older women in private nonfarm jobs were covered by a pension plan in their present job or had vested rights from some previous job. *Id.* at p. 51.

[10] "Termination of Pension Plans: 11 Years' Experience," Emerson H. Beier, Monthly Labor Review, June 1967, at p. 26.

[11] Tables of Bankruptcy Statistics (ending June 30, 1966) of the Administrative Office of the United States Courts, Washington, D. C., at p. 4.

401(a) was amended to require, as a further condition of qualification, that:

> "A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that, upon its termination or upon complete discontinuance of contributions under the plan, the right of all employees to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the amounts credited to the employee's accounts are non-forfeitable" (76 Stat. 809).

In September, 1963, the Treasury issued regulations to put meat on the statutory bones (Treas. Reg. Section 1.401-4 and 1.401-6; 28 Fed. Reg. 10115, 10119-21). On account of this amendment to Section 401 the employees covered by pension funds which became qualified since 1962—and perhaps also the pension funds which became qualified prior to 1962—must, upon termination of these funds, immediately receive all of their equities in the funds. Distribution cannot, of course, be made of money that has not been collected. "Most pension plans do not, at any one point in time, have sufficient resources to fully discharge all of their liabilities".[12]

Clearly, therefore, whenever a bankruptcy results in the termination of a pension fund, at least if said fund was qualified since 1962, the failure to grant a wage priority to the pension fund must result in depriving the employees of a part of their compensation.

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[12] Beier, "Termination of Pension Plans," Monthly Labor Review, June 1967, at p. 28.

When a bankruptcy involves a member of a multi-employer pension plan, such plan may well survive the bankruptcy, albeit with a consequent strain upon the fund's ability to make its agreed upon payments to the participants. In any event, the effect of a denial of a wage priority to pension funds must be to tend to deprive employee participants of sums of money which they otherwise would receive.

The Embassy Decision Is Inapplicable to the Annuity Fund:

This Court in *Embassy* denied a wage priority to the Welfare Fund for four reasons, all inapplicable to the Annuity Fund herein, as follows:

> (a) "Let us examine the nature of these contributions. They are flat sums of $8. per month for each workman. The amount is without relation to his hours, wages or productivity" (359 U. S. 32).

Contributions to the Annuity Fund are at a flat rate of $4.00 for each day worked, and are thus related to the time worked, while the contributions to Embassy's Welfare Fund were related solely to the calendar. Wages of workmen are, of course, customarily based upon time worked.

The contributions to private pension funds covering craftsmen and production workers typically are sums equal to percentages of the weekly wages, and thus are based upon both wages and time worked. Despite this distinction between the *Embassy* type of fund and the typical pension fund, we believe that no pension fund has been

granted a wage priority in any bankruptcy litigation since this Court's decision in *Embassy*. It therefore appears that on account of *Embassy*, which involved a plan which was funded in an atypical manner, a precedent has been established which now deprives of wage priority plans which are funded in a far different manner.

(b) "It is due the trustees, not the workman, and the latter has no legal interest in it whatsoever" (359 U. S. 32).

The participants named hereinabove (pp. 3-5) who did not seek or find employment with another contributing employer could have demanded and received payment of the balance in their individual accounts,[13] and eleven of these participants did so, at the rate of $50.00. per month ($60.00.

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[13] With respect to pooled pension funds, in which no individual participant accounts were kept, and which were established either by unilateral contract or by collective bargaining agreement, the Courts have held that these Plans created vested rights in employees who continue in employment for the required number of years; that a retired employee could sue to enforce these rights and that others similarly situated may be permitted to intervene. *Hurd* v. *Illinois Bell Telephone Co.* (C. A. 7, 1956), 234 F. 2d 942. *Booth* v. *Security Mutual Life Ins. Co.* (D. C. N. J. 1957), 155 F. Supp. 755. Individual employees' beneficiaries may challenge the legality of payments to the Fund and may sue for accounting, injunction and distribution of assets. See *Barbot* v. *Frackman* (D. C. N. Y. 1961), 191 F. Supp. 171. The employee's rights to benefits continues even after his employer terminates its contributions to a Welfare Fund (*Del Veccio* v. *Hood*, 4 N. J. Super. 254, 66 A. 2d 738) and after termination of the collective bargaining agreement. *New York City Omnibus Corp.* v. *Quill* (N. Y. 1948), 189 Misc. 892, aff'd 272 App. Div. 1015 and 297 N. Y. 832. A retired incompetent worker may bring suit for declaratory judgment as to his pension rights. *Hoffman* v. *Victory* (N. Y. 1953), 281 App. Div. 849. The benefits are attachable to pay support awards,

for workers leaving after January 1, 1965) (R. 10). The right of the Annuity Fund's participants to bring suits and obtain judgments for the balance in their accounts, payable in monthly installments, were such payments denied to them by the Annuity Fund, is not in dispute.

> (c). "That (Congress') purpose was to provide the workman a 'protective cushion' against the economic displacement caused by his employer's bankruptcy. These payments, owed as they are to the trustee rather than to the workman, offer no support to the workman in periods of financial distress" (359 U. S. 33).

The Annuity Fund does offer a limited "support to the workman in periods of financial distress." The Annuity Fund's participants are most likely to experience financial distress if they do not find desired employment in the industry and cease to be participants. While such cessation of employment is not necessarily a period of financial distress (the participants may immediately go into business or commence employment in another industry or another community) surely it is the most probable period of financial distress which they may be expected to encounter. In this event they may obtain immediate return of their equity in monthly installments.

It is true that pursuant to the terms of many other pension plans the employees would not be eligible to receive

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any provision in the Plan to the contrary notwithstanding. See *Thiel* v. *Thiel* (N. J. 1964), 41 N. J. 446, 197 A. 2d 354. Upon a participant's death the beneficiaries have a vested interest. *Boyd* v. *Curran* (D. C. N. Y. 1958), 166 F. Supp. 193. These decisions apply to the Annuity Fund *a fortiori*.

monies immediately. In those instances the employees would nevertheless feel more free to withdraw sums from their regular savings accounts, secure in the knowledge that the equities which they were building up in their pension funds would be available later.

Furthermore, in view of the prevalence of unemployment compensation it may be argued that the "protective cushion" function of the wage priority has to some extent been preempted.[14] In any event, to the extent that this function is not preempted, it has not proved meaningful. This Court should judicially note that employees of employers who file petitions in bankruptcy often wait years before Trustees in Bankruptcy wind up their affairs, and file their final accounts; only after the final accounts are filed and approved are wage claims usually paid.

> (d) "Furthermore, if the claims of the trustees are to be treated on a par with wages, in a case where the employer's assets are insufficient to pay all in the second priority, the workman will have to share with the Welfare Plan, thus reducing his own recovery" (359 U. S. 33-34).

In fact, however, no wages payable directly to the electricians were owed to the employees of the bankrupt; furthermore, the likelihood that Annuity Fund claims could reduce recovery of wage claims is largely theoretical. No employer in the construction field could long continue operations without meeting the payroll regularly. Obligations to

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[14] See Federal Social Security Act, 49 Stat. 626-27 (1935), 42 U. S. C. Sections 501-03, authorizing appropriation of Treasury money to assist the States in administration of their Unemployment Compensation Laws.

trust funds, however, like tax obligations, usually are substantial when a bankruptcy petition is filed.

Action by Congress Is Not Required:

The Court below recognized the force of the argument that payments to the Annuity Fund should receive a wage priority. The Court stated:

> "It has been forcefully argued that contributions to funds like the Annuity Plan should receive a wage priority in bankruptcy. See, e.g., *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29, 35 (1959) (Black, J. dissenting); Note, Union Retirement and Welfare Plans' Employer Contributions as "wages" Under Section 64a(2) of the Bankruptcy Act, 66 Yale L. J. 449, 460-61 (1957). But in light of the Supreme Court's decision in *Embassy Restaurant*, such an argument must be made to Congress, not to this court" (R. 10).

Since the decision in *Embassy*, Congress has mandated that the preservation of pension and welfare funds shall be supervised constantly by the Federal Government.[15]

The courts below have held that because of this Court's decision in *Embassy* the argument in favor of a wage priority must be made to Congress. We respectfully urge that Congress could not have intended that its laws which now protect the security of payments to pension funds, as

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[15] Welfare and Pension Plans Disclosure Act, 72 Stat. 997 (1958), 74 Stat. 417, 76 Stat. 35 (1962), 29 U. S. C. 301-09, 18 U. S. C. 664, 1027. See also Section 302 of the Taft-Hartley Act, 61 Stat. 157-58, 29 U. S. C., Section 186 (1947), which mandates annual audits and separate funds for payments for pensions and annuities established pursuant to collective bargaining.

well as the Regulations of the Internal Revenue Service pursuant to Section 401(a) IRC, cited heretofore, be made less meaningful on account of the depletion of these funds caused by an overly narrow construction of Section 64a(2).

The Embassy Decision Has Heretofore Been Distinguished:

The Ninth Circuit in *Sulmeyer* v. *Southern California Pipe Trades Trust Fund* (C. A. 9), 301 F. 2d 768 granted a wage priority to contributions to a Vacation and Holiday Benefit Fund and held that this Court's opinion in *Embassy* was inapplicable to that Fund. The Court below expressed no opinion concerning the validity of the rationale in *Sulmeyer,* but distinguished *Sulmeyer* upon the grounds that:

> a. "it rested on the facts that vacation pay had already been held entitled to a wage priority, see, e.g. United States v. Munro-Van Helms Co., Inc., 243 F. 2d 10 (5 Cir. 1957),"
>
> b. "that taxes were withheld from employees on contributions to the Fund," and
>
> c. "that the Fund established a separate savings account for each employee" (R. 10).

With respect to these distinctions:

> a. *Munro-Van Helms* concerns vacation pay payable directly to the employees, with priority limited to one-fourth of the annual vacation pay, and is therefore not applicable to claims filed by trust funds.
>
> b. This court in *Embassy Restaurant* did not concern itself with whether income taxes were withheld from employees on contributions to the Fund. Sec.

64a(2) was enacted in 1841 (c. 9, 5 Stat. 444), when there were, of course, no income taxes to withhold. We respectfully urge that the Congress which enacted Section 64a(2) did not intend to deprive any claims of the status of wages because the payments were owing pursuant to an arrangement made to postpone and minimize income taxes. "Wages * * * due to workmen" should not be construed to read *wages due to workmen provided, however, that the United States collects some of these wages first.*

c. While the Annuity Plan did not establish a separate savings account for each of its more than 10,000 employee participants, it does substantially the same thing. The Annuity Plan sends to each participant a monthly statement setting forth the total contributions received on his behalf, together with the dividends currently added thereto. Each statement sets forth each participant's total vested interest in the Annuity Plan.

This Court in *Embassy* (359 U. S. at 34, 38-39) discussed *Shropshire Woodliff & Co.* v. *Bush*, 204 U. S. 186, and particularly the citation therein that "The (wage) priority is attached to the debt, and not to the person of the creditor. * * *", and held that the application of this principle did not help the legal position of the Welfare Fund. We respectfully urge that the *Shropshire* principle is nevertheless applicable to the Annuity Fund herein. The Ninth Circuit in *Sulmeyer* applied the *Shropshire* principle to the Vacation and Holiday Fund therein, and stated:

"The facts of this case bring it into closer alignment to the 'assigned wage claim' cases than to Embassy Restaurant, supra" (301 F. 2d at 771).

This Court has authority to deviate from the priorities set forth in the Bankruptcy Act in the interests of justice and equity (*Sampsell* v. *Imperial Paper Corp.*, 313 U. S. 215). What principle of equity preserves the right of a speculator who purchases wage claims in quantity, or the right of a surety through subrogation (*Home Indemnity Corp.* v. *F. H. Donovan Painting Co.*, C. A. 8, 1963, 325 F. 2d 870) to enforce priority wage claims, yet denies that same right to trustees who are conserving wages pursuant to a government approved (I. R. C., Section 401) plan?

This Court recognized the force of this argument in *United States* v. *Carter*, 353 U. S. 210 (1957), an action which concerned the liability of a surety on a Miller Act payment bond, when this Court held that payment to Trustees of a Health and Welfare Fund must be covered by such payment bond, since under the Miller Act such bond is required "for the protection of all persons supplying labor. * * *." This Court stated:

> "If the assignee of an employee can sue on the bond, the trustees of the employees' fund should be able to do so. Whether the trustees of the fund are, in a technical sense, assignees of the employees' rights to the contributions need not be decided. Suffice it to say that the trustees' relationship to the employees, as established by the master labor agreements and the trust agreement, is closely analogous to that of an assignment * * *.
>
> "Moreover, the trustees of the fund have an even better right to sue on the bond than does the usual assignee since they are not seeking to recover on their own account. The trustees are claiming recovery for the sole benefit of the beneficiaries of the fund, and

those beneficiaries are the very ones who have performed the labor. The contributions are the means by which the fund is maintained for the benefit of the employees and all other construction workers. For purposes of the Miller Act these contributions are in substance as much 'justly due' to the employees who have earned them as are the wages payable directly to them in cash." *United States* v. *Carter, supra,* at pp. 219-20.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed.

Dated: January 1968.

Respectfully submitted,

HAROLD STERN
Attorney for Petitioner,
Joint Industry Board of the
Electrical Industry

Of Counsel:

HAROLD STERN
NORMAN ROTHFELD

No. 616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY AND WARREN C. SCHWARTZ, TRUSTEE IN BANKRUPTCY OF A & S ELECTRIC CORP.,
Petitioners

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

J. Albert Woll
General Counsel, AFL-CIO
Robert C. Mayer
Laurence Gold
736 Bowen Building
815 Fifteenth Street, N. W.
Washington, D. C. 20005

Thomas E. Harris
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N. W.
Washington, D. C. 20006

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This *amicus* brief is filed by the American Federation of Labor and Congress of Industrial Organization (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred and twenty-nine affiliated national and international labor unions having a total membership of approximately fourteen million workers. These unions have been at the forefront of the efforts to provide workingmen and women adequate pension and welfare benefits. Thus, the latest government figures available indicate that in 1960 78% of the employees covered by collective bargaining agreements were covered by health and insurance plans and 60% by pension plans.

Since the comparable figures in 1950 were 47% and 34% the number of employees covered by such collectively bargained benefits today is undoubtedly higher, *see* Department of Labor, Bureau of Labor Statistics Report No. 228, Health and Insurance and Pension Plan Coverage in Union Contracts 1960.

This Court's decision in *Embassy Restaurant, Inc.* v. *United States,* 359 U.S. 29 (1959), over the dissent of Mr. Justice Black, the Chief Justice and Mr. Justice Douglas, which denies the wage priority provided in §64(a) (2) of the Bankruptcy Act, 11 U.S.C. §104(a) (2), to claims for monies due to finance welfare benefits has created substantial problems for unions in their efforts to provide secure welfare benefits. The decision of the court below (R. 6-10) which extends *Embassy Restaurant* to claims for monies due to finance annuities for workers compounds these problems. For many of the covered workers are employed by small marginal employers. Too often these marginal operators suffer the pangs of financial distress and teeter on the verge of bankruptcy. As a result, experience indicates that payments to pension and welfare plans may well become delinquent. The plans in question, of course, make every effort to collect the payments due. Yet, as a practical matter, there are times when a crucial determination must be made; whether it is absolutely necessary to cancel welfare policies of covered employees or lower their pension benefits when an employer has failed to keep current with contributions to a fund, and for that matter, to press for delinquent payments with the possibility of the employer actually going out of business; or, to allow a reasonable amount of leeway with the hope that it will allow him to continue in business and thus maintain the jobs of his employees, not to speak of making good upon his obligations to the plan. This is not an easy determination to make. In those instances where such leeway is given, the employees involved are usually not deprived of the medical and hospital insurance or pension credits so vital to them and their families, and where the employer does survive,

his payments are brought back to a current status. Unfortunately, where such a delinquent employer does not survive, then not only are the jobs of the workers lost, but under the current interpretation of §64 (a)(2), the delinquent payments to the plan are often lost as a practical matter. This occurs because these payments are not entitled to any other priority, and the priority debts may be sufficient in amount to exhaust the balance of the bankrupt's estate, leaving nothing for non-priority claims. Because of these practical considerations and because of our firm belief that the majority opinion in *Embassy Restaurant* is an unwarranted departure from earlier authority, and is unsound in its reasoning, the AFL-CIO wishes to take this opportunity to urge this Court to adopt the soundly reasoned opinion of the dissenters in that case.

ARGUMENT

WHEN AN EMPLOYER OBLIGATES HIMSELF IN A COLLECTIVE BARGAINING AGREEMENT TO MAKE PAYMENTS TO A WELFARE OR PENSION PLAN COVERING HIS WORKMEN A CLAIM FOR UNPAID MONIES DUE SHOULD BE ACCORDED THE WAGE PRIORITY IN THE BANKRUPTCY ACT

§64(a) (2) of the Bankruptcy Act, 11 U.S.C. §104(a)(2) provides that "wages . . . due to workmen" are entitled to a priority in bankruptcy. In the instant case an employer obligated himself, in a collective bargaining agreement, to pay certain monies to a plan which covered his employees and provided them with annuities. He had not fulfilled that obligation in its entirety at the time he went into bankruptcy and the question presented here is whether the wage priority is applicable to a claim for that unpaid balance due. In *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29 (1959) this Court dealt with the related question of whether a claim for the unpaid obligation to a welfare fund, which provided life insurance coverage, sick benefits, and hospital and surgical benefits for

the workers it covered, was entitled to the wage priority. The Court held, over the dissent of Mr. Justice Black, who was joined by the Chief Justice and Mr. Justice Douglas, that the wage priority did not apply. The Petitioners, in their brief in the instant case, have shown that the reasoning of the majority in *Embassy Restaurant* is inapplicable to the claim asserted here, and to claims for unpaid obligations to pension plans generally. We are in complete accord with the points made in that brief and we incorporate them by reference. In addition, with all deference, we further submit that both the reasoning of, and the result reached by, the majority in *Embassy Restaurant* are unsound, that the opinion constitutes a unwarranted departure from prior authority, and the approach taken by the dissenters in that case is entirely correct. We, therefore urge the Court to take the opportunity provided by the instant case not simply to reach the right result here, though that of course is important in itself, but also to clarify the law governing this general area by adopting the soundly reasoned position of the dissenters in *Embassy Restaurant*. Because it is our view that the dissenters in that case have already stated the basic principles which should apply here, we will restrict our argument first to showing why both the realities of collective bargaining and an equitable approach to the wage priority support their view, and second to an attempt to demonstrate the defects in the majority approach.

1. *The Opinion Of The Dissenters In Embassy Restaurant States The Correct Governing Rule Of Law.* The basic point made by Mr. Justice Black in his dissent in *Embassy Restaurant* was (359 U.S. at 37-38):

> "Courts have long held that compensation for services rendered is a valid definition of 'wages' both in the priority section of the Bankruptcy Act and in other contexts. This is certainly in accord with the customary meaning of the word. It appears, moreover, that unions and employees consider such payments as the equivalent of wages and that they have been treated as wages in other statutes. In fact, where such treatment has

seemed undesirable, Congress has expressly excluded them from the category." (footnotes omitted)

In sum, the term "wages" should be held to include every obligation an employer assumes in a collective bargaining agreement which requires him to make payments to his employees directly, or to their designee. The realities of collective bargaining as it has evolved under the national labor policy provide compelling support for this definition of wages. That policy provides for "collective bargaining with the right to strike at its core" *Motor Coach Employees* v. *Missouri*, 374 U.S. 74, 82 (1963) as to any matter which constitutes a mandatory subject of bargaining, *see National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958). Regular cash payments, deferred payments for pensions, vacation pay, sick pay, etc., payments to purchase health and welfare benefits all constitute mandatory subjects of bargaining, *see e.g. Inland Steel Co.* v. *National Labor Relations Board*, 170 F.2d 247, 251 (7th Cir., 1948), *certiorari denied on this point* 336 U.S. 960. Employees thus have a right to engage in a collective refusal to work if an unsettled dispute as to the amount of any of these payments exist. Therefore, when the quantum of these payments is settled the only realistic assessment of the settlement is that the total amount of the employees' compensation for their labor has been fixed. In other words the agreement provides that their labor is to be exchanged for the employer's promise to pay them, or their designees, the agreed upon sums of money.

Because of the fact that employees have the equal right, and equal power, to demand payment in any one of the forms just noted, it is common for unions to regard all of them as components of a single overall aggregate—the wage package. And, union demands are generally formulated on the basis of such an overall package. At different times depending on the prior history of negotiations, the evolving character of the work force, the state of the economy generally, and the nature of other settlements, increases in different components of the package

may be emphasized, In an inflationary period, for example, increases in cash wages may be stressed. Where the work force is comprised of a high proportion of older employees, increases in employer contributions to the pension fund may be given first priority. Moreover, depending on the desires of the membership, a tentative decision to press for an increase in cash wages may be traded off for an increase in vacation pay, or pensions, or vice versa. The variations are literally endless, but the theme is, we believe, clear enough without spelling them out in detail. Moreover, looked at from the employer's point of view, it is equally plain that the aggregate payment he obligates himself to make is his dominant consideration. For his primary focus is on his labor cost per unit of production and a dollar paid to a welfare fund adds to labor costs just as a dollar paid in cash wages does. In a resolution urging repeal of *Embassy Restaurant* the delegates to the AFL-CIO's Fourth Constitutional Convention, held in December 1961, summarized their extensive experience as to the nature of collective bargaining as follows:

> "Welfare and pension funds financed by employer contributions have expanded in number and scope with an almost explosive force, and workers, unions, employers, Congress and recognized authorities have universally agreed that such contributions are equivalent to wages paid in ready cash. To the employer, such payments represents a direct "labor cost" of his doing business just as real as the hourly piece rate or other fringe benefits which have been held to constitute "wages" under the Bankruptcy Act, and to the worker such payments represent part of his pay which serve to provide him, and in many instances, his dependents, with insurance protection when confronted with illness, and security in old age, and, as such, these payments are a form of compensation just as real as the monies received in the weekly pay envelopes."

The soundness of this description of the realities of collective bargaining has received governmental recognition in the formulation of the so-called price-wage guideposts. For example, in the 1964 Economic Report of the President

(G.P.O. 1964), the guidepost concept was stated as follows (p. 118):

> "The guideposts contain two key propositions. The first—the general guidepost for wages—says that, in a particular firm or industry, the *appropriate noninflationary standard for annual percentage increases in total employee compensation per man-hour (not just in straight-time hourly rates)* is the annual increase in national trend output per man-hour." Emphasis added, *see also* 1967 Economic Report of the President, p. 121 (G.P.O. 1967).

In addition, further support for the proposition that contributions to welfare and pension plans and cash wages are interchangeable portions ~~for~~ a single wage package is available from a variety of sources. The following few examples should, we believe, more than suffice for our purpose here. Arthur J. Goldberg, then General Counsel of the C.I.O., and an experienced negotiator, put the essential point as follows in a 1955 statement:

> "The union and management come to the bargaining table with some appraisal of how much money there is in the 'kitty' for an increase. The appraisals are, naturally, different. But it is the total cost of improvements which provides the framework within which the union and management bargain. If the 5 cents, for example, does not go into a health fund, it can go into a wage increase or two extra holidays or double time for overtime on Saturdays. This is what collective bargaining is all about. "Harbrecht, Pension Funds and Economic Power, 39 (1959). *See also* Johnson, *Ford Supplemental Unemployment Benefit Plan"* (Machine and Allied Products Institute). Financial Review 1, 3 (1957) for a statement reflecting the same views by a management spokesman.

It has also been stressed in arbitration decisions. In *Rock Products Employees of Southern California,* 29 L.A. 101, 122 (1957), the arbitrator stated:

> "In the opinion of the Arbitrator the Employers' contribution to the pension program is, in effect, a de-

ferred wage increase and therefore the money involved is the Employees', conceded to them in collective bargaining negotiations in the same category as wages or any other economic benefit." *See also, Pittsburgh Ry. Co.*, 33 L.A. 862, 866 (1959).

Finally, numerous bargaining settlements explicitly evidence the wage package approach. The 1959 Steel agreements provided for specified cents per hour wage increases at the agreements's anniversary date, but also provided that if by that time pension plan costs had increased, the amount of the increase would be deducted from the scheduled wage increase, 45 L.R.R.M. 12, 13 (1959). And when General Motors and the UAW reached a contract settlement in 1961, they announced that a portion of a cost-of-living wage increase which was scheduled to occur just prior to the new agreement would be applied "toward payment of increased pensions." 48 L.R.R.M. 25, 26 (1961).

In *Embassy Restaurant*, Mr. Justice Black dealt with the construction of the remaining relevent phrase in §64(a) (2) —"due to workmen"—in the following manner (359 U.S. at 39-40):

> "In Shropshire [Woodliff & Co. v. Bush, 204 U.S. 186], the Court said, 'The priority is attached to the debt and not to the person of the creditor; to the claim and not to the claimant. The act does not enumerate classes of creditors and confer upon them the privilege of priority in payment, but, on the other hand, enumerates classes of debts as 'the debts to have priority.' 204 U.S. at 189. It then held that an assignee of a worker had priority since the debt was wages due to workmen.
>
> "Even if it could be meaningfully argued that in Shropshire the money was at one time due to workmen, and therefore remained so after assignment, while here it never was due to them, we are, I think, precluded from that position unless we depart from the reasoning of United States for benefit of Sherman v. Carter, 353 U.S. 210. That case construed §2(a) of the Miller Act, 49 Stat 794, 40 USC §270b (a), which provides that 'Every person who has furnished labor . . . and who has not been paid in full . . . shall have the right to

> sue on [a] payment bond . . . for the sum or sums justly due him.' The Court held that, for the purposes of the Miller Act, payments to welfare funds are, 'as much "justly due" to the employees who have earned them as are the wages payable directly to them in cash.' 353 U.S. 220. In fact, the Court stated that trustees of the welfare fund have an even better right to sue than most assignees since the trustees, unlike the usual assignee, sue for the benefit of the workers. Ibid."

This portion of the dissenters' position also finds a firm foundation in the basic nature of the dynamics of collective bargaining. The fact that workers can strike to compel payments to their designee, as well as direct payments to themselves, demonstrates that all the obligations assumed by the employer in the collective agreement are in reality obligations owned to them and that beneficial enjoyment of the monies paid to a pension or welfare plan is to be confined to the covered employees. The nominal title holder to those funds cannot use them for any other purpose. This restriction on beneficial ~~employment~~ enjoyment of the funds paid into a plan is enforced by federal law. Thus, if the plan is one which requires payments to a trust jointly administered by labor and management, § 302 of the Labor Management Relations Act of 1947 29 U.S.C. § 186, provides that:

> "(A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance;
>
> • • • • •
>
> "and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities."

Moreover, if the plan in question is to be one qualified for favored tax treatment, Section 401(a) of the Internal Revenue Code, 26 U.S.C. § 401(a) requires that:

> ". . . under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries.
>
> • • • •
>
> "A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that, upon its termination or upon complete discontinuance of contributions under the plan, the rights of all employees to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the amounts credited to the employees' accounts are nonforfeitable."

It is, therefore, perfectly plain that both the genesis of the obligation to pay monies into pension and welfare plans, and the legal limitations placed on the distribution of those funds, establish that those payments are "due to workmen". The creation of separate pension and welfare plans from which to pay these benefits as they become due and the appointment of trustees to manage them should not be allowed to obscure this point for these developments are designed to emphasize the point that the monies in question are for the *sole beneficial enjoyment of the workmen who provide their labor in exchange for these payments.* And these protective devices are encouraged by federal law to insure the safety of the accumulated monies so that the legitimate expectation of the workers who order their affairs in reliance upon the existence of these plans will not be disappointed.

Indeed, any attempt to differentiate the treatment which claims for different portions of the wage package receive in bankruptcy leads to inequitable treatment for different groups of workmen. For there is no dispute over the point

that if employees choose to seek only cash wages paid directly to them the unpaid moneys owing are "due to workmen". The same result follows if workmen choose to take a portion of their compensation as vacation pay, or severance pay paid directly to them, *United States* v. *Munro-Van Helms Co.*, 243 F.2d 10 (5th Cir., 1957). In addition, if they choose to have a portion of their compensation paid into a trusteed plan which distributes vacation pay, the moneys payable to that plan are also regarded as "wages . . . due to workmen." *Sulmeyer* v. *Southern California Pipe Trades Trust Fund*, 301 F.2d 768 (9th Cir., 1962). Moreover, employees are also free to bargain for a wage package which leaves the employer free to pay pension benefits directly to his workmen if he chooses to do so despite the tax consequences of that choice. For example, the Collective Agreement between the United States Steel Corporation and the United Steelworkers of America leaves the administration of the Pension Plan to the Company, Section 9.1, CCH Pension Plan Guide p. 31, 315, ¶ 43,777 and states that the Company "may establish . . . a pension trust . . . for the purpose of supplying the pension benefits herein provided." Section 7.1, *Ibid* at p. 31, 315, ¶ 43,775. Thus, so far as the workers covered by that plan are concerned, the Company is free to pay them the benefits due directly. To say that the obligation a company thus assumes in the instances just noted is one "due to workmen" but that the obligation is not "due to workmen" if it is to finance pension or welfare benefits and if it is paid to a trust or some other form of special fund appears to us to exalt form over substance. For we can conceive of no reason of policy for saying that employees who take any one of these different choices of allocating their compensation should be in a different substantive position from those who have chosen a different method.

2. *The Reasoning Of The Majority Opinion In Embassy Restaurant Is Unsound And Should Not Be Followed.* The majority's opinion in *Embassy Restaurant* has three basic components. In the first (359 U.S. at 33) the majority di-

rected its attention to ascertaining whether the obligation to make contributions to the welfare fund there possessed the customary attributes of "wages . . . due to workmen" and evidentally concluded that these customary attributes are that the payments have "a relation to hours, wages and production", that if the payment is made to a fund the workmen must have a "legal interest in the fund . . . to compel payment", that the payment must be labelled wages and not contributions, and that the obligations must run directly to workmen in the first instance and not to trustees who enjoy "sole title . . . and the exclusive management of the funds".

We respectfully submit that there are several errors in this analysis. The most critical of these is that the entire discussion on this point focuses on surface characteristics rather than on the matrix upon which the obligation in question is based, and the purpose to which the funds are dedicated. For example, the conclusion that in a particular instance the contributions in question are not based on hours worked, a percentage of hourly wages, or on productivity is not a point which serves to distinguish the contributions from payments of cash wages. One of the basic bargaining demands of various unions has been that cash wages should not be rigidly tied to hours or productivity. Thus many unions have traditionally fought the piece-rate system, and in recent years there have been determined efforts to secure contracts which provide employees with an overall sum per year whether or not they are forced to miss work because of sickness, accident or a lack of work; in other words, for the guaranteed annual wage.[1] To the extent that this movement has succeeded

[1] The 1967 Bargaining Convention of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) put the guaranteed annual wage concept in the following terms:

> "The objective is not to obligate any firm, regardless of the fate of its business, to retain all its present employees on the payroll for the rest of their lives. It is rather to immunize their incomes and the security of their families for a period of time against adverse effects flowing from fluctuations in the

thus far, or may succeed in the future, it has not caused anyone to suggest, so far as we are aware, that the cash wages which would be due under such a system of payment would not be entitled to the wage priority. Moreover, there are a number of methods for computing contributions to welfare and pension plans. As the instant case shows contributions may be based on time worked, and they may also be based on productivity, *see Lewis* v. *Benedict Coal Co.*, 361 U.S. 459 (1960), or set as a fraction of the hourly straight time cash wage.[2] We can see no reason of policy for treating the obligation incurred under any one of these systems differently from the others for the purposes of the Bankruptcy Act.

Nor is the inquiry advanced by stating that the workmen covered by a pension or welfare plan may not have a direct right to compel payments to that plan. For the definition of wages for the purposes of §64(a)(2) has always included severance pay, and in *Republic Steel Corp. v. Maddox*, 379 U. S. 650 (1965) this Court held that because of the arbitration provision in the applicable contract the employee in that case was required to process a grievance concerning

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volume of business. In the case of the annual guarantee, upon which we shall insist, the immunity will be assured for a year at a time. As each new year begins, workers and their families will be able to look forward with confidence to a steady flow of income, week by week, for the next twelve months. The UAW member, whether employed in the plant, the office, the drafting room, or the laboratory, would, in effect, have an annual contract of employment.

"If actual employment was not forthcoming, income would nevertheless continue. We can be sure, however, that, when workers' incomes must be counted as overhead costs, corporate managements will concentrate their enormous ingenuity on the task of making the flow of work as nearly as possible as steady as the flow of worker incomes to which they will be obligated." BNA Collective Bargaining—Negotiations and Contracts, 12:27.

[2] For example, the 1966-1968 Agreement between The Associated General Contractors of America, Detroit Chapter, and the Metropolitan Executive Committee of Bricklayers of Detroit, provides that the Pension and Holiday components of the "Gross Wage" shall each be 6% of the "Base Wage", i.e. the hourly straight time cash wage.

severance pay allegedly due to him through the offices of his union and not directly in a court suit, *see also Vaca* v. *Sipes,* 386 U.S. 171 (1967). Thus, the fact that beneficiaries of a pension or welfare plan may have to look to the trustees of that plan in asserting their legal rights does not serve to distinguish those benefits from other components of the wage package.

In addition it is not accurate to say that workmen do not have a legal interest in a fund or trust which provides them with pension and welfare benefits. All the moneys which flow into such funds and trusts must be dedicated to the beneficial enjoyment of the covered employees under federal law, *see* pp. 9-10 *supra.* These laws point up the error of focusing on the fact that a trustee may have title to the funds for they make it perfectly plain that his interest is a nominal one. And as we noted above, the requirement of a separate fund or trust is the product of the desire to protect workers. Indeed to the extent tax considerations are irrelevant, and where the union is not interested in having a joint voice in the management of the funds, it is perfectly proper to have an agreement in which the employer agrees to pay pension and welfare benefits directly to the covered employees. And once again we can see no reason why the obligation to make such direct payments should be treated differently from the obligation to make payments to a fund or trust when that fund or trust must pay the money over to workmen.

It is, of course, true that most plans provide that "no person shall have any right, title or interest in or to the fund or any part thereof", *see* Section 9(c) of the Annuity Fund (R. 53). But this does not mean that the monies in question are not for the benefit of the covered employees. As the Petitioners' attorney explained, "This provision protects the Participant from creditors and other claimants, but does not prevent any Participant from obtaining the monies accumulated in his personal account" (R. 44-45). Moreover, such provisions also protect the plan from claims from participants who have not met whatever eligi-

bility requirements the plan may contain. These dual purposes are spelled out in the U. S. Steel—Steelworkers Plan in the following language (Sections 9.3 & 9.5, CCH Pension Plan Guide p. 31,316, ¶ 43,779, ¶ 43,781):

> "No pension payable under this Agreement shall be subject in any way to alienation, sale, transfer, assignment, pledge, attachment, garnishment, execution, or encumbrance of any kind, and any attempt to accomplish the same shall be void.
>
> • • • •
>
> "No participant prior to his retirement under conditions of eligibility for pension benefits shall have any right or interest in or to any portion of any funds which may be paid into any pension trust or trusts heretofore or hereafter established for the purpose of pensions and no Participant or co-pensioner shall have any right to pension benefits except to the extent provided in this Agreement."

Thus these provisions protect the workmen covered by the particular plan and spell out the precise nature of his legal interest.

Finally, and to us this is the essence of the matter, the analysis of the majority opinion does not lead to any rational demarcation line susceptible of principled application by the lower courts. Despite the fact that in a realistic sense all components of the wage package agreed to in a collective agreement are inextricably intertwined the majority's analysis allows the wage priority to cash wages and to some forms of deferred compensation, such as vacation pay and severance pay, apparently without regard to whether or not these items are paid directly to the workmen or to a plan, *see Sulmeyer, supra,* 301, F.2d 768, while denying the preference to contributions due to pension and welfare plans.

The second portion of the majority's opinion focused on the purpose of the wage priority. It found that purpose to be to provide "the workmen a 'protective cushion' against economic displacement caused by their employer's bankruptcy" (359 U.S. at 33-34). Again, we must respectfully

submit that this portion of the opinion will not bear critical examination. For this invocation of Congressional intent is not based on the legislative history of the wage priority. As the Government candidly admitted in *Embassy Restaurant*, ". . . The Reports of Congressional Committees pertaining to the . . . Act . . . do not state the purpose of the priority provision . . ." (Gov. Br. No. 174, Oct. Term, 1958, 15). The cushion theory is thus a judicial creation and not a reflection of background material helpful in ascertaining the Congressional will. It is, moreover, a judicial creation that does not aid in the resolution of any other issue which may arise under §64(a)(2), and which merely restates the ultimate conclusion to the present problem reached by the majority. This point is illustrated by the lower court cases cited by the majority. The first, *Re Victory Apparel Mfg. Co.*, 154 F. Supp. 819, 822 (U.S. D.C. N.J., 1957) concerned the issue raised in *Embassy Restaurant*. The second, *Blessing* v. *Blanchard*, 223 F. 35 (9th Cir., 1915) dealt with the question of whether a general manager, and a superintendent of the shop, of an automobile dealer were within the term "workmen." In the course of the decision, the Court of Appeals stated (223 F. at 37):

> "Priority of payment was intended for the benefit only of those who are dependent upon their wages, and who, having lost their employment by bankruptcy, would be in need of such protection."

Initially, the question of the definition of workmen scarcely seems despositive on the definition of wages. In addition, the quoted portion of the opinion does not, in fact, provide support for the cushion theory. The point stressed in *Blessing* is that Congress evidently felt that the relatively lowly paid workman was entitled to special consideration. This suggests that those who are workmen for the purposes of §64(a)(2) should get the entire compensation due to them and not that they should receive only a portion of the overall sum for which they exchanged their labor. Thus since there is a lack of meaningful legislative history we submit that the definition of wages here should be one which accords with the normal legal definition

of that term in other ~~contents~~ contexts and with the realities of collective bargaining. The definition which fits these criteria is the one proposed by the dissent, *see* pp. 4-8 *supra*.

Moreover, there can be little doubt that the protective cushion theory as applied in *Embassy Restaurant* does not make sense. As the Petitioners point out (Pet. Br. 17) wage claims are normally paid years after the bankruptcy has occurred. Thus, no matter how the amount of the priority is computed it is unlikely that the monies involved will help the employee weather the immediate consequences of the bankruptcy. In addition the satisfaction of a claim by a welfare or pension plan may be comparable in effect to the satisfaction of a claim for cash wages. For eventual satisfaction of the plan's claim enables it to afford the employees the continued protection of a life insurance or medical benefit policy in the interim and that may be as valuable as the eventual payment of cash wages due. Moreover, if the pension plan in question is a single employer plan it will probably be terminated at or soon after the bankruptcy. In such a situation the monies in the plan may be distributed or used to buy paid-up annuities depending on the funds available. And in any event, all the monies in the plan will go to the covered employees, *see* pp. 9-10 *supra*.[3] Certainly, where a plan is discontinued, the net effect on the workmen is essentially the same as that of a payment of cash wages or of a distribution from a vacation fund or severence pay fund, *cf. Sulmeyer, supra* 301 F.2d 768.

Finally, so far as we have been able to ascertain, there is no support for the majority's belief that the cushion theory is necessary to avoid overlapping claims for cash wages and monies due for pension and welfare benefits. Neither in the instant case nor in *Embassy Restaurant* were there claims for cash wages. Our discussions with labor lawyers familiar with this field indicate that such

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[3] Provisions for terminating a pension trust are often detailed and elaborate. For an example see the provision in the General Motor—UAW Pension Plan set out at CCH Pension Plan Guide pp 31, 227-31, 229, ¶ 43, 653-¶ 43, 659.

claims are relatively rare. To us this is an additional reason for rejecting the cushion theory. For the restrictive meaning it attributes to the wage priority apparently goes far to expunge §64(a)(2) from the books despite the fact that "the history of the section is one of continuous Congressional expansion", 359 U.S. at 35 (dissenting opinion).

The final portion of the majority opinion is addressed to a consideration of *Shropshire, Woodliff & Co.* v. *Bush*, 204 U. S. 186 (1907) and *United States ex rel Sherman* v. *Carter*, 353 U. S. 210 (1957). The majority disposed of *Shropshire Woodliff* on the ground that in *Embassy Restaurant* "the obligation to make contributions, when incurred, was to the trustees, not to workmen" (359 U.S. at 34). But the payments in question there were not gifts and the trustees in question had performed no services for the employer and had no beneficial interest in the monies paid into the fund. It is, therefore, plain that the payments were made in exchange for the covered workmen's labor, and that the beneficial interest in the employer's contribution flowed to them. The debt was therefore one that was owed to them at its inception. This is the substance of the matter if not the form. Thus, as the dissenters recognized, *see* p. 8 *supra*, *Shropshire Woodliff* is exactly in point here. Next, the majority dealt with *Carter* by stating that that case did not deal with the meaning of wages (359 U.S. at 34). Acceptance of that assertion, however, does not dispose of *Carter* for that case did deal with the meaning of "sums justly *due* . . . persons furnishing labor", and it did hold that payments to a welfare fund covering workers are payments due to the persons who have furnished their labor. There would appear to be little doubt that *Embassy Restaurant* departs from the sound teachings of *Carter* in its construction of the phrase "*due* to workmen". This being so, *Carter*, at the least, is directly relevant to the construction of that phrase in §64(a) (2), and the majority advanced no reason for failing to follow it.

In conclusion we recognize that it could be argued that the position we have taken pays insufficient heed to *stare decises*. We believe however that such an argument is unsound in the circumstances of the instant case. For all that we urge this Court to do is to return to the sound principles of *Shropshire Woodliff, Carter* and the many cases which have given the term "wages" its proper and natural legal definition. In essence then, our argument has simply been an attempt to show that the majority in *Embassy Restaurant* gave insufficient deference to *stare decises* and that the reasons given by the majority in that case in support of its refusal to follow earlier lines of authority are unsound on both practical and legal grounds. And the excision of an unwise exception to earlier authority does not, we submit, offend *stare decises*. Moreover, the adoption of the dissenters' position in *Embassy Restaurant* is doubly justified here since it will not upset the reliance interest of any group. For we strongly doubt that the Government, the parties entitled to the lower priorities, or unsecured creditors have conducted their affairs with an eye to the extent of the wage priority.

Conclusion

For the above stated reasons, as well as those set out in Petitioners' brief, the judgment of the court below should be reversed.

Respectfully submitted,

J. Albert Woll
General Counsel, AFL-CIO
Robert C. Mayer
Laurence Gold
736 Bowen Building
815 Fifteenth Street, N. W.
Washington, D. C. 20005
Thomas E. Harris
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N.W.
Washington, D. C. 20006

January 1968

No. 616

In the Supreme Court of the United States

OCTOBER TERM, 1967

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
MITCHELL ROGOVIN,
Assistant Attorney General,
HARRIS WEINSTEIN,
Assistant to the Solicitor General,
GEORGE J. B. GARRETT,
KARL SCHNEIDERMAN,
HOWARD M. TOPP,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 13–20) is not officially reported. The opinion of the court of appeals (R. 6–10) is reported at 379 F. 2d 211.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1967 (R. 4–5). The petition for a writ of certiorari was filed on September 14, 1967, and was

granted on December 4, 1967, 389 U.S. 969. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether amounts a bankrupt employer owes to the trustees of a union retirement and disability fund established under a collective bargaining agreement constitute "wages * * * due to workmen" entitled to a priority pursuant to Section 64a(2) of the Bankruptcy Act.

STATUTE INVOLVED

Bankruptcy Act, c. 541, 30 Stat. 544:

> Sec. 64 [as amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840, 874, and Sec. 1, Act of July 30, 1956, c. 784, 70 Stat. 725]. *Debts Which Have Priority.*—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen * * * [11 U.S.C. 104].

STATEMENT

On January 9, 1963, the A & S Electric Corporation ("A & S") filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. The arrangement was never confirmed and the company was adjudicated a bankrupt on November 6, 1963 (R. 23).

Local 3 of the International Brotherhood of Electrical Workers represented electricians employed by

A & S. Petitioner Joint Industry Board of the Electrical Industry, an unincorporated association, manages, through eight trustees, an annuity fund for the benefit of members of Local 3 (R. 67, par. 2(a)).[1] The Joint Industry Board filed a proof of claim in the Chapter XI proceeding for $10,537.34. Of that sum, $5,114 represents contributions to the annuity plan that became due, but were not paid, during the three months preceding January 9, 1963 (R. 23).

The annuity plan (R. 67), adopted pursuant to a collective bargaining agreement between four contractors' associations and Local 3, makes each union employee a participant in the plan and requires each employer to contribute $4 for each day's work by each participant (R. 67, pars. 5–6). A separate account is maintained on the books for each participant, to which are credited amounts employers pay with respect to that person's work (R. 67, par. 5(b)). All funds, however, are apparently commingled. The trustees have title to all money; no participant, other beneficiary, employer, union, "or any other person, partnership, corporation or association shall have any right, title or interest in or to the Annuity Fund or any part thereof." (R. 67, par. 9(c).) The trustees are authorized to manage the funds contributed to the plan "in their sole discretion" (R. 67, par. 2(e)), and are liable only for such losses as are "due to their wilful misconduct or fraud." (R. 67, par. 2(g).)

[1] "R. 67, par." refers to the paragraph numbers of the "Annuity Plan of the Electrical Industry," a separately paginated pamphlet attached to p. 67 of the record in this Court.

Only the trustees "have the power to demand, collect and receive Employer payments * * *" (R. 67, par. 9(d)). Although employers' contributions are required (R. 67, par. 5(c)) to "be forwarded weekly to the Trustees within one * * * week after each payroll period," the trustees apparently made no effort to enforce this provision against A & S. The $5,114 claim includes amounts that were as much as 40 workdays overdue (Br. 3–5).[2]

Benefits are payable on five contingencies (R. 67, par. 7): death, retirement, permanent disability, entrance into the Armed Forces, or withdrawal from the New York City electrical industry. Whatever event creates the right to payment, the participant or his beneficiary is entitled to "receive all monies to the account of such Participant, in monthly installments." (R. 67, par. 7(b).) Such monthly payments of principal vary in amount, from the $50 paid to those who withdrew from the trade before January 1, 1965, to $150, which is the monthly payment to electricians who, at the age of 60 or more, retire on or after January 1, 1965.[3] The monthly payments continue at that

[2] "Br." refers to the brief of petitioner Joint Industry Board.

[3] A participant who, before January 1, 1965, became permanently disabled (and had been employed by a contributing employer or available for employment for less than 10 years), ceased permanently to be a participant, or entered the Armed Forces received monthly payments of $50 (R. 67, par. 7(f)(1)). The monthly payment is $60 if any such events occurred on or after January 1, 1965 (R. 67, par. 7(f)(2)). Monthly retirement benefits range from $75 to $150, in $25 steps, depending upon the date of retirement but not length of service. The latter benefits obtain in the case of permanent disability of a

fixed amount until the moneys credited to the participant's account are exhausted.[4] In addition, beneficiaries of those who die while employed or available for employment, or while receiving retirement or disability benefits, receive death benefits which range in total from $500 to $5,000, and which are paid "out of income, if available, in monthly installments" of $125 each.[5] The plan expressly provides that all benefits are non-assignable and immune from attachment, garnishment, or other process of creditors (R. 67, par. 9(f)).

The Joint Industry Board and the trustee in bankruptcy (the other petitioner) stipulated that the $5,114 would be accorded the second priority of "wages * * * due workmen" established in Section 64a(2) of the Bankruptcy Act (R. 24). When the stipulation was submitted for the referee's approval, the United States asserted that the claim was not entitled to priority, and therefore was not superior to the government's fourth priority claim for taxes

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participant who has been employed or was available for employment by a contributing employer for at least 10 years (R. 67, par. 7(d)).

[4] If death occurs before exhaustion of the principal amount, the balance is payable monthly to the participant's designated beneficiary (R. 67, par. 7(f)(3)).

[5] Those who die while working or available for work in the industry receive benefits ranging from $1,000 to $5,000, depending upon the date of death (R. 67, par. 7(a)(1)–(6)). For those dying after retirement, or after a permanent disability following 10 years of service, the death benefit is $500 plus $250 for every year of continuous participation in excess of one year, to a maximum of $3,750 (R. 67, par. 7(e)(2)). Before July 1, 1964, the death benefits were paid at the rate of $100 monthly (R. 67, par. 7(c)).

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totaling $15,587.55 (R. 39).[6] The referee, relying on this Court's decision in *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29, denied the claimed priority. The District Court for the Eastern District of New York and the Court of Appeals for the Second Circuit affirmed, each agreeing that allowance of the priority would be inconsistent with *Embassy Restaurant*.

SUMMARY OF ARGUMENT

This case is indistinguishable from, and is fully controlled by, the Court's decision in *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29.

Embassy Restaurant held that amounts owed trustees of a union health and welfare fund are not encompassed by the phrase, "wages * * * due to workmen," which is used in Section 64a(2) of the Bankruptcy Act to define amounts accorded second priority. In the nine years since that decision Congress has not seen fit to overrule the case, notwithstanding the continuing introduction of legislation directed at such a purpose, and the intervening reenactment of Section 64a. In the past, Congress has, in contrast, promptly changed judicial interpretations of Section 64a with which it disagreed. Any change in the rule of *Embassy* would in addition create substantial practical and administrative problems, since claims of employees

[6] The United States later filed claims for priority under Section 64(a)(1) for taxes accruing during the arrangement proceedings of $4,374.85. These claims are conceded to be prior to the annuity-plan contributions. Cf. *Nicholas* v. *United States*, 384 U.S. 678.

and claims of unions stemming from the work of those employees may well exceed the $600 maximum the second priority allows each claimant.

The decision in *Embassy* is the only one consistent with the traditional meaning of "wages * * * due to workmen." It also is the only one consistent with the purpose of that priority—to protect workers who would not otherwise have "a 'protective cushion' against the economic displacement caused by his employer's bankruptcy." 359 U.S. at 33.

There is no warrant for interpreting the phrase "wages * * * due to workmen" through reference to the meaning of the word "wages" in other statutes, such as the National Labor Relations Act and the Internal Revenue Code. Those statutes serve very different purposes than the bankruptcy act, and it is the history and policies of the latter that must determine the meaning of Section 64a(2).

Although there are factual differences between this case and *Embassy,* none of them calls for a different result. While each employee will ultimately receive, at a stipulated monthly rate, repayment of the contributions made on his behalf, enjoyment of the benefits is postponed, except in atypical cases, for a long period. Thus, the amount owed the trustees do not as a general matter offer any present benefits to the employees. Only by fortuity would giving a priority to such contributions help the employee over short-term financial difficulties resulting from an employer's bankruptcy. Here, as in *Embassy,* the contributions

are payable to trustees. The employees have no right to enforce payment, and have minimal rights to police the management of the fund.

ARGUMENT

INTRODUCTION

"The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of a bankrupt's estate among creditors holding just demands * * *."[7] Much of the history of national bankruptcy legislation is concerned with the claims of one class or another of unsecured creditors that "equity" warrants their having a priority status in the distribution of the debtor's estate. Congress and the courts, however, have taken a cautious approach in defining claims that are to have priority over those of the general creditors. "The theme of the Bankruptcy Act is 'equality of distribution' (*Sampsell* v. *Imperial Paper & Color Corp.*); and if one claimant is to be preferred over others, the purpose should be clear from the statute."[8]

Here the critical issue is whether there is a clear statutory mandate to allow the amounts owed to the Joint Industry Board the preferred status. Section 64a(2) of the Bankruptcy Act gives (up to $600) to "wages * * * due to workmen" earned within the three months preceding bankruptcy. In *United States*

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[7] *Kothe* v. *R. C. Taylor Trust*, 280 U.S. 224, 227; see, also, *Kuehner* v. *Irving Trust Co.*, 299 U.S. 445, 451, 452; *Sampsell* v. *Imperial Paper Corp.*, 313 U.S. 215, 219.

[8] *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25, 28–29; see, also, *Carpenter* v. *Wabash Railway Co.*, 309 U.S. 23, 28.

v. *Embassy Restaurant, Inc.*, 359 U.S. 29, this Court held that amounts a bankrupt employer owed the trustees of a union health and welfare fund do not come within this category. The overdue contributions were held neither to be "wages" within the meaning of this statute nor "due to workmen." The Court discerned nothing in the language or legislative history of the statute to suggest that Congress intended Section 64a(2) to deal with anything other than the ordinary matter of back pay owed personally and directly to a workman.

This case, we contend, is indistinguishable from, and is fully controlled by, *Embassy*. The employer contributions here, as the ones there, do not fit traditional concepts of "wages * * * due to workmen" and do not provide any meaningful support to the participating employee during periods of economic distress resulting from an employer's bankruptcy.

Whether *Embassy* controls here is the principal issue petitioners raise; they seek to distinguish the present case on the ground that the pension fund here vests a right to future income in the participant, whereas a greater uncertainty attended the receipt of health and life insurance and the other benefits involved in *Embassy*.

The Joint Industry Board at one point of its brief (Br. 17) seems to urge that *Embassy* was wrongly decided and should be overruled. The *amicus curiae* AFL–CIO plainly so argues. They make no attempt, however, to show that in the nine years since *Embassy* was decided, its rule in any way has endangered the

financial stability or existence of union welfare or pension funds, or has handicapped their growth. Their basic arguments are those that were fully presented but rejected in *Embassy*. For the reasons given below, we believe that *Embassy* was correctly decided, and that, if any change is now to be made, it should be by legislation.

Logically, the question whether *Embassy* should be overruled need not be reached unless it is decided that *Embassy* controls this case. But it seems so clear that none of the grounds upon which petitioner would distinguish *Embassy* is tenable (see Point II, below), that we think it appropriate first to deal with the contention that the case should be overruled.

I. *UNITED STATES v. EMBASSY RESTAURANT, INC.*, WAS CORRECTLY DECIDED AND SHOULD NOT BE OVERRULED

A. CONGRESS HAS BEEN ASKED TO CHANGE THE RESULT OF THAT DECISION, AND HAS NOT DONE SO

United States v. *Embassy Restaurant* has been the rule of decision for nearly a decade. [redacted] In every Congress since that decision, a bill has been introduced to overrule the case. For example, bills introduced in each of the last three Congresses would have amended Section 64a(2) to allow within the second priority "indirect wages," defined to mean:

> Any sum payable by a bankrupt to a trustee, insurance company, or other third party for pension, health insurance, or other benefits for

> a person to whom direct wages have been paid or are payable by the bankrupt.[9]

The introduction of these legislative proposals shows congressional awareness of the issue. In this light, the complete reenactment of Section 64a in 1967[10] takes on special significance. The failure of Congress, then or at any other time, to heed union petitions (see A. C. 6)[11] to add to the second priority amounts due to union health, welfare, and pension funds stands in contrast to the several occasions on which Congress has acted to change the interpreta-

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[9] Identical provisions were offered in H.R. 2076 in the 90th Congress, H.R. 991 in the 89th Congress, and H.R. 1784 in the 88th Congress.

H.R. 66 introduced in the 88th Congress would have amended Section 64a(2) to insert a parenthetical clause, "including any sums due a trustee, insurance company, or other third party for pension, health insurance, or other benefits for such claimant." A somewhat different formulation was offered in a Senate bill, S. 1295, introduced the same year, which called for adding to Section 64a(2) the following:

> [A]nd, further, for the purpose of establishing priority under this clause and for computation of the maximum claim to which priority can be given, payments due to any fund or plan established for the purpose of providing employee benefits, which are based upon hours worked or wages paid, shall, if such payments would qualify as deductible from the employer's gross income under the provisions of the Internal Revenue Code, be deemed to be wages assigned to the fund or plan by the individual employees upon whose service or wages such payments are based; * * *

Bills identical to H.R. 66 of the 88th Congress were introduced in the 86th Congress as H.R. 9831, and the 87th Congress as H.R. 2274. This language found its origin in H.R. 8805, introduced in the 85th Congress the year before the decision in *Embassy*.

[10] See Act of November 28, 1967, P.L. 90–157, 81 Stat. 511.

[11] "A.C." refers to the brief of *amicus curiae* AFL–CIO.

tion that this or another Court has given Section 64a. Congress has done this in four ways.[12] It has also acted to resolve a disagreement among the lower courts as to whether salesmen are entitled to the second priority.[13]

These indications that Congress would have changed *Embassy* if that decision did not correctly implement the legislative will should be enough to sustain it.[14]

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[12] The Act of May 27, 1926, c. 406, Section 15, 44 Stat. 667, overruled the result of *Davis* v. *Pringle*, 268 U.S. 315, that the United States is not a "person" within the meaning of what is now Section 64a(5) of the Bankruptcy Act. The Act of July 7, 1952, c. 579, Section 19, 66 Stat. 426, changed the rule of *In re Goldenberg*, 3 F. Supp. 727 (Pa.); *In re Rosenstein*, 2 F. Supp. 726 (Pa.); and *In re Layman Whitney Assoc. Inc.*, 11 F. Supp. 212 (N.Y.), which disallowed first priority for filing fees paid by persons other than bankrupts in voluntary cases. The same act changed the principle of *In re Columbia Ribbon Co.*, 117 F. 2d 999 (C.A. 3), and *United States* v. *Kelloren*, 119 F. 2d 364 (C.A. 8), that no priorities shall exist within classes of priority under Section 64. The Act of September 25, 1962, Section 8, 76 Stat. 571, overruled the decision of *Guerin* v. *Weil Gotshall & Manges*, 205 F. 2d 302 (C.A. 2), which disallowed first priority expenses of petitioning creditors who obtained an adjudication after a contest.

[13] The Act of July 30, 1956, c. 784, Section 1, 70 Stat. 725, resolved a conflict between *In re Herbert Candy Co.*, 43 F. Supp. 588 (E.D. Pa.), and *Thompson* v. *Kronheim*, 178 F. 2d 477 (C.A. 6), on one side, and *In re Clover Dairies, Inc.*, 42 F. Supp. 1006 (S.D.N.Y.); and *In re Colein*, 18 F. Supp. 848 (S.D.N.Y.), on the other side, as to whether a salesman must be an employee, and not an independent contractor, to qualify for wage priority.

[14] See, *e.g.*, *Missouri* v. *Ross*, 299 U.S. 72, 75 (declining to change rule of *New Jersey* v. *Anderson*, 203 U.S. 483, 489, that all tax claims are of equal rank under Section 64a); *Canada Packers* v. *A.T. & S.F.R. Co.*, 385 U.S. 182, 184; *Reed* v. *The Yaka*, 373 U.S. 410, 414; *Francis* v. *Southern Pacific Co.*, 333 U.S. 445, 449–450.

The present case is entirely dissimilar to *Helvering* v. *Hal-*

There are, however, other, highly practical reasons for leaving to Congress the decision of the question whether claims for union welfare and pension funds should be entitled to a priority and how that priority should be related to the traditional wage claims within the present second priority. The statute limits the second priority to "$600 to each claimant." It may well occur that an employee's claim, together with the claims of a union fund with respect to the employee's wages, exceeds that amount. Each cannot be allowed in full. Nor is there a statutory basis for allowing the employee's claim to come ahead of the union's, and still give the latter the priority. Presumably they must share proportionally. Thus, if a workman claims $600, and his union $200 on the workman's "account," the result would be to reduce the workman's maximum priority recovery to $450—three-fourths of the amount Congress had in mind. Even if the combined claims of employee and union under the second priority do not exceed $600 for each employee, "in a case where the employer's assets are insufficient to pay all in the second priority, the workman will have to share

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lock, 309 U.S. 106, where there was no indication that Congress was aware of the Court's earlier decision. Nor is this a case like *Girouard* v. *United States*, 328 U.S. 61, where a later-enacted statute was inconsistent with an earlier decision. Contrary to petitioner's suggestion (Br. 18), the Welfare and Pension Plans Disclosure Act—the principal provisions of which were enacted before the decision in *Embassy*, 72 Stat. 997 (1958)—was not at all concerned with the impact of an employer's bankruptcy on pension and welfare funds. Its focus was the possibility of mismanagement by the trustees or officers of such funds. See S. Rep. No. 1440, 85th Cong., 2d Sess., p. 19.

with the [union] * * * plan, thus reducing his own recovery." *Embassy Restaurant*, 359 U.S. 33–34.

It does not resolve these difficulties to assert, as petitioners do (Br. 17), that the problems are theoretical. The very circumstance of this case indicates the real and practical degree of the problems. The claims here relate to the pension accounts the Joint Industry Board maintains for 39 electricians.[15] In 18 instances, the accrued pension contributions were $172 or more,[16] with the highest two being $204. Data collected by the Department of Labor suggest that the average union wage in this particular industry exceeds $5 an hour.[17] The employees concerned in this case apparently were earning as much as $50 a day at the time A & S filed its Chapter XI petition. See 49 L.R.R.M. 6; New York Times, January 19, 1962, p. 1, col. 4. Other highly compensated trades do not receive significantly less.[18] Even assuming, as petitioners contend (Br. 17), that "[n]o employer in the construction field could long continue operations without meeting the payroll reg-

[15] Although petitioners list 40 union members, no amount is shown with respect to one, who is described as "Terminated" (Br. 4).

[16] In 29 instances $100 or more was overdue.

[17] See the press release of the Bureau of Labor Statistics, No. USDL: 8561, dated February 8, 1968, which reports that union electricians in cities of population of more than 100,000 receive, apart from overtime, an average hourly compensation of $5.24. See, also, *Union Wages and Hours: Building Trades* (U.S. Dept. of Labor Bull. No. 1547, July 1, 1966), at p. 34, reporting that journeymen electricians were on that date receiving, in New York City, $5.32 hourly, again ignoring overtime.

[18] See authorities cited in fn. 17, *supra*.

ularly," missing but a single weekly payroll would mean that each employee would have an accrued wage claim of $200 or more. Thus back salary for as few as eight work days together with pension claims of the magnitude presented in this suit would accrue a claim that approaches the $600 limit.

The fact that no employee's wage claims were presented in this case (Br. 17) has no bearing on whether there might be claims in other cases. Certainly the courts should not presume from the record in one case that such claims are infrequent in occurrence or insignificant in amount. For example, in fiscal 1966 about $2,000,000—or about 2 percent of the total paid out in bankruptcy proceedings—was received by employees having a second priority.[19]

If, however, petitioners are correct in their speculation that workmen's claims are, as a practical matter, *de minimis* in amount, addition to the second priority of such claims as petitioners present would substantially change the character of distribution in bankrupt estates. If the amount distributed annually under the second priority was substantially increased by allowing this priority to welfare and pension funds, the percentage of the estates available for subordinate priority and general creditors would be accordingly reduced. This would not be consistent with the basic policy decision that Congress must have made in de-

[19] See *Tables of Bankruptcy Statistics*, Report of the Administrative Office of the United States Courts for the Year Ending June 30, 1966, at Table F5. The data do not indicate how many employees shared in the $2,000,000.

ciding how to structure the priorities in order to be fair to all claimants.

There are, necessarily, many uncertainties in attempting to predict the practical effect of allowing petitioner's claim within the second priority. The judicial fact-finding process, directed as it is to the issues of a particular case, is ill-suited for an inquiry into the precise nature of the effect of a change in the *Embassy* rule. Congress is better able than the courts to determine the present needs of workmen as compared to the demands of union welfare and pension funds, and the needs of these funds as compared to those of creditors having a subordinate or no priority.[20]

B. CONGRESS INTENDED TO GIVE IN SECTION 64a(2) A SECOND PRIORITY IN BANKRUPTCY TO SUMS THAT OFFER EMPLOYEES IMMEDIATE AND DIRECT ASSISTANCE IN DEALING WITH SHORT-TERM, ECONOMIC DISPLACEMENTS RESULTING FROM AN EMPLOYER'S BANKRUPTCY

Embassy Restaurant correctly decided that employer contributions owed to union welfare and pension funds should not be accorded a second priority in

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[20] The propriety of legislative rather than judicial consideration of whether the law should be changed is reflected by two features of the recent bills that have been introduced to overrule *Embassy Restaurant*. First, they would have increased from $600 to $2,000 the total amount allowed to each second-priority claimant. Second, those bills would *not* have treated the claims of union pension and welfare funds on a par with those of workmen. They instead provided that if the total claims of the workman and the welfare or pension fund exceeded the proposed $2000 limitation, then the priority of the latter should be limited to "the excess, if any, of $2000 over the direct wage claims." See H.R. 2076, 90th Cong., 1st Sess.; H.R. 991, 89th Cong., 1st Sess., H.R. 1784, 88th Cong., 1st Sess. Compare *Commissioner* v. *Brown*, 380 U.S. 563, 578–579.

bankruptcy. That decision effectuated the congressional intent, reflected in a century of history of bankruptcy legislation, to restrict the phrase "wages * * * due to workmen" to the usual and traditional concept of amounts owed directly to employees for their present use and benefit.

The Act of August 19, 1841, c. 9, 5 Stat. 440, was the first statutory use of the words "wages" and "due to" in formulating a priority for amounts owed employees. Section 5 of that Act gave a third priority to "wages," up to $25, "due to" "any person who shall have performed any labor as an operative in the service of any bankrupt * * *." The same formulation—giving a priority to a limited amount of "wages" that are "due to" employees for services performed in some period immediately prior to bankruptcy—was included in all succeeding bankruptcy legislation. Thus, Section 28 of the Act of March 2, 1867, c. 176, 14 Stat. 517, gave fourth priority to:

> wages due to any operative, clerk or house servant, to an amount not exceeding fifty dollars for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

The Bankruptcy Act of 1898, the present Bankruptcy Act, accorded a specific priority to (30 Stat. 544, c. 541, Sec. 64b):

> wages due to workmen, clerks, or servants, which had been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant * * *.

In 1906, "traveling or city salesmen" were added to the types of employees entitled to priority; see Act of June 15, 1906, c. 3333, 34 Stat. 267.

In 1926, the maximum wage claim was increased from $300 to $600, see Section 15 of the Act of May 27, 1926, c. 406, 44 Stat. 662. Wage claims were advanced from a fourth to a second priority—from behind to ahead of taxes—in 1938. Act of June 22, 1938, c. 575, 52 Stat. 840, Sec. 1. Otherwise, except for an amendment intended to define the word "salesman,"[21] the language has remained unchanged. Thus, the phrase now in Section 64a(2)—"wages * * * due to workmen"—is virtually the same as the formula first used in 1841. The only change in language is the substitution of such words as "workmen," "clerks," "servants," and "salesmen" for the original phrase, "any person who shall have performed any labor as an operative."

These changes modified or at least defined with more precision the class of employees entitled to share in the priority, but they did not extend the priority beyond the particular kind of claim Congress initially sought to protect in 1841. Each formulation of the priority has used the words pertinent to this case—"wages" and "due to"—and nothing indicates that Congress at any time intended the words to have anything other than their ordinary sense of compensation owed directly to employees for services they performed. Any enlargement of the priority beyond this traditional concept of "wages * * * due to workmen"

[21] Act of July 30, 1956, c. 784, 70 Stat. 725, Sec. 1.

must, as this Court held in *Embassy Restaurant,* be based on the policy that underlies Section 64a(2): "the purpose of Congress has constantly been to enable employees displaced by bankruptcy to secure, with promptness, the money directly due to them in back wages, and thus to alleviate in some degree the hardship that unemployment usually brings to workers and their families." 359 U.S. at 32.

The very nature of the employment of the people who are given the statutory priority supports this conclusion. The priority is restricted to a group which tends to depend for its subsistence upon its uninterrupted daily or weekly earnings, and therefore would not have adequate savings or other reserves to fall back upon when discharged upon an employer's business failure.[22] Such people have a limited choice of employment and are not in a position, as a practical matter, to evaluate the employer as a credit risk. Moreover, the priority is limited to wages earned within a specified short period—now three months [23]—

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[22] See, *e.g.*, *Blessing* v. *Blanchard*, 223 Fed. 35, 37 (C.A. 9) (a general manager of a business did not require, and was not entitled to, the priority); *Manly* v. *Wood*, 37 F. 2d 212, 213–214 (C.A. 4); *In re Paradise Catering Corp.*, 36 F. Supp. 974, 975 (S.D.N.Y.) (and actress who was a star and principal in a show was not a "workman" or "servant"); *In re Estey*, 6 F. Supp. 570 (S.D.N.Y.) (a teacher is a professional worker, and not a "workman, clerk, salesman, or servant"); *In re Inland Waterways Inc.*, 71 F. Supp. 134 (D. Minn.); *In re Lawson Electric Co.*, 300 Fed. 736 (S.D.N.Y.).

[23] Although the time periods have varied, Congress—since the inception of wage priority in 1841—has consistently required that the protected wages be earned within a limited period before bankruptcy. Act of August 19, 1841, c. 9, 5 Stat. 440, Sec-

before the commencement of the bankruptcy proceeding, which reflects the idea that to the extent an employee is able to perform services without compensation for a more protracted period he is not likely to require a priority of payment for his support.[24]

Congress could readily have modified the 125-year-old statutory formula, "wages * * * due to workmen" if it intended the priority to cover debts other than those due immediately and directly to employees. As this Court recognized in *Embassy Restaurant*, it is instructive to consider the contrasting congressional treatment of workmen's compensation claims. Taken as an *a priori* matter, there is no fringe benefit that would be more analogous to "wages" than workmen's compensation awards, which are designed to compensate an employee for damages and loss of work he suffers as the result of a job-connected injury or illness. Yet, such claims were not even provable in bankruptcy until 1934, when Congress amended Section 63 so as to allow their proof. See Act of June 7, 1934, c. 424, 48 Stat. 923, Sec. 4(a). Even then Con-

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tion 5 (six months); Act of March 2, 1867, c. 176, 14 Stat. 517, Section 28 (six months); Bankruptcy Act, c. 541, 30 Stat. 544, Section 64 (three months). The parallel provision in Section 17a of the Bankruptcy Act, *infra*, contains a similar time limitation on the discharge of wage claims.

Section 17a(5) was enacted in 1922 in order to supplement the protection afforded workmen under Section 64a(2) by allowing recourse against the bankrupt himself. Act of January 7, 1922, c. 22, 42 Stat. 354. See H. Rep. No. 426, 67th Cong., 1st Sess., and S. Rep. No. 353, 67th Cong., 2d Sess. See also, Debates, 61 Cong. Record 7055.

[24] See *In re Caldwell*, 164 Fed. 515 (Ark.).

gress did not give such claims the same priority as "wages * * * due to workmen." Rather, it gave them a seventh priority, substantially subordinate to the then fourth priority of wage claims. Only four years later, in 1938, Congress eliminated entirely the priority accorded workmen's compensation claims, in the same bill that advanced wage claims to the second priority. See Act of June 22, 1938 c. 575, 52 Stat. 840, Sec. 1.

The central thesis of the *amicus* plea for an overruling of *Embassy Restaurant* is that the word "wages" in Section 64a(2) of the Bankruptcy Act should include any amount that a collective bargaining agreement requires an employer to pay to a union—*i.e.*, that it should have the same meaning as it has in the portion of the National Labor Relations Act that makes "wages" a mandatory subject of bargaining (A.C. 5). But the meaning of the word "wages" here must be determined by reference to the history and policies of the Bankruptcy Act, and not by the interpretation given the word in other statutes with different histories and different aims. As this Court explained in *Nathanson* v. *Labor Board*, 344 U.S. 25, 28–29:

> The contest [in bankruptcy] now is no longer between employees and management but between various classes of creditors. * * * [I]f one claimant is to be preferred over others, the purpose should be clear from the statute. * * *

Were the word "wages" in Section 64a(2) to be defined by canvassing other statutes where it appears, the Labor Act would not be the only point of reference.

For example, the definition in the Internal Revenue Code, 26 U.S. 3401—which, petitioners agree, excludes the amount for which they claim priority (Br. 8)—should be at least as pertinent as that in the Labor Relations Act. Indeed, since the history of Section 64a(2) shows some congressional concern with the relative priority accorded "wages" and "taxes" in bankruptcy, see pages 17–18, *supra,* if resort is to be had to other statutes the definition of the Internal Revenue Code is the more pertinent.

In any event, the *amicus* argument goes too far. Consider, for example, the treatment of union dues that, pursuant to a collective bargaining agreement, are checked off from an employee's wages, but where the employer is adjudicated a bankrupt before paying them over to the union. Under the *amicus'* approach, these amounts would be accorded the second priority of "wages * * * due to workmen." But such amounts cannot fairly be distinguished from income taxes or social security contributions that, as required by statute, similarly are withheld from the employee's weekly wage but are not paid over to the United States before bankruptcy. These amounts and employers' Social Security contributions, have, however, been treated as "taxes" entitled to only a fourth priority. See *Connecticut Motor Lines* v. *United States,* 336 F. 2d 96 (C.A. 3). Were the *amicus* theory to prevail, would the United States then be entitled to assert a second, rather than a fourth, priority for such claims?[25]

[25] The same difficulty obtains in the reliance petitioners (Br. 20), the *amicus* (A.C. 18–19), and the dissent in *Embassy* (359

For these reasons the meaning of the phrase "wages * * * due to workmen" in Section 64a(2) of the Bankruptcy Act cannot be determined except by reference to the history and function of the priority provisions of the Bankruptcy Act itself. Whatever the word may mean in the National Labor Relations Act, in the income tax law, or in other statutes such as the Miller Act,[26] has no relevance for present purposes. And even if these other statutes were thought material, the most that can be said is that the possible inferences from such other legislative materials are at a standoff. They in no way impeach the conclusion of *Embassy* that an employee's receipt of benefits on the basis of contingencies having no relationship to the bankruptcy of the employer does not offer a "protective

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U.S. at 38–39), place on *Shropshire Woodliff & Co.* v. *Bush*, 204 U.S. 186. That case allowed within the second priority amounts a workman had assigned the claimant and that were concededly unpaid "wages" that were "due to" the assignor. If, as has been argued, amounts owed welfare and pension funds are to be considered "assignments" within the rule of *Shropshire*, so should federal taxes on the employee's compensation. The point of distinction is that *Shropshire*, in recognizing the assignee's priority, allows the workman to reduce his claim to cash quickly. No comparable "protective cushion" would be provided by allowing the second priority to the claims of union funds or the tax collector.

[26] Petitioners (Br. 21–22), the *amicus* (A.C. 18), and the dissent in *Embassy* (359 U.S. at 39) rely on *United States* v. *Carter*, 353 U.S. 210, which dealt with the Miller Act. 40 U.S.C. 270–270d. That act allows trustees of a union welfare fund to recover unpaid contributions from the surety on the employer's payment bond. The statutory language is quite different from Section 64a(2) of the Bankruptcy Act. It does not limit recovery to "wages" but allows suits for all claims that are "justly due."

cushion" that gives "support to the workman in periods of financial distress" and they therefore did not perform the function that Congress had in mind in awarding a second priority to "wages * * * due to workmen." See 359 U.S. at 33. The decision in *Embassy* thus correctly implements Section 64a(2) and should not be overruled.

II. THERE IS NO MATERIAL DISTINCTION BETWEEN THIS CASE AND *EMBASSY RESTAURANT*

The contributions to Local 3's annuity plan involved here offer the participant no more of "a 'protective cushion' against the economic displacement caused by his employer's bankruptcy" than did the welfare fund involved in *Embassy*. The objectives of the plan lie in the future, not the present. It is on this basis that such contributions are allowed an exemption from income tax under the Internal Revenue Code and the fund is not subject to tax on its income.

The only "protective cushion" petitioners perceive is the monthly stipend that a participant receives upon becoming unavailable for employment by a New York City contractor. This contingency is not likely to occur often.[27] Nor is it likely to have more than a

[27] Petitioners assert (Br. 15) that 11 of the participants who were once employed by A & S have withdrawn from the industry. This assertion has no foundation in the record. Petitioners offered to the court of appeals a letter to this effect; but there is no indication of when these withdrawals occurred and whether any of them had any relation to A & S's bankruptcy. The only matter of record on this subject is the statement, see petitioners' brief at p. 4, that one participant, G. A. Hester, had "terminated."

coincidental relation to a particular contractor's business failure.

Even if the petitioners were correct in asserting that a significant number of participants secure, by withdrawal from the industry, short-term benefits upon an employer's insolvency, it still would not follow that the objectives of the Bankruptcy Act would be served by allowing the second priority to contributions overdue from the electrician's last employer. So long as the employee has a previous history of employment within Local 3's jurisdiction, he would receive his $50 or $60 each month for several months, with or without such a priority. This is so because the maximum monthly payment of $60 represents only 15 days' work as a participant in the plan. Thus, assuming that the employee has worked for as little as three months for which contributions were made by his employer, there would be enough to pay him the maximum $60 benefit for a period of four months. Had he worked for as little as a year, he would receive the benefits for sixteen months, again without regard to whether the second priority was provided in a case such as this. Moreover, the very structure of Local 3's annuity plan, which requires ten years' service for maximum benefits, contemplates much longer average periods of service by participants in the plan.

Petitioners are equally unable to show that the employer's contributions to the annuity fund are "due to" the participants. In their Statement, petitioners suggest that the individual electricians could have filed claims for these same amounts. The facts,

however, are quite the converse. The annuity plan (R. 67, par. 9(d)) expressly requires that "[a]ll suits and proceedings to recover Employer payments, or to * * * demand or claim in behalf of the Trustees or of the Annuity Fund" may be brought only by the chairman of the trustees, or by any two trustees, including one employer and one union representative.

Thus, as in *Embassy,* contributions are payable to the trustees of a fund, and not to the employees; the employees' rights are severely limited. They do not have standing to sue the employers to compel payment to the trustees. They do not have power to compel the trustees to manage the fund in one way rather than in another.

Local 3, had it wished, could have structured its annuity fund so as to bring amounts owed it closer to the meaning and function of "wages * * * due to workmen." Thus it could have made the employer's contributions payable in the first instance to the employees, with the proviso that the amounts be withheld in the same manner as union dues or federal taxes are withheld. It could equally have made the benefits assignable; it preferred, however, to give the fund the nature of a spendthrift trust. It could have used the fund to provide supplemental unemployment benefits, as has the United Auto Workers, 57 L.R.R.M. 8–9, thus providing to some extent the same short term protection that the second priority in Bankruptcy affords. But the former two courses would have jeopardized the exclusion of such payments from the employee's wages for tax purposes and the latter approach would have subjected the Joint Industry Board to the taxes im-

posed on trusts. See Section 501 of the Internal Revenue Code of 1954.

The union also might have given its members the right to compel payment of overdue employer contributions; perhaps if it had, arrearages would not have accumulated for ten weeks, and this case would not have arisen. And the union, if it had been willing, could have made the trustees more subject to the oversight of the union members; but it chose instead to limit their liability to the greatest extent possible.

Had any of these things been done, some reasoned distinction from *Embassy* might be possible. Had they all been done, *Embassy* probably would not apply. For this case would then be much like *Sulmeyer* v. *Southern California Pipe Trades Trust Fund,* 301 F. 2d 768, where the Ninth Circuit allowed a second priority to the claims of a union Vacation and Holiday Benefit Fund, contributions to which were placed in savings accounts in the names of individual employees and paid over to them at Christmas and vacation times.

Perhaps a distinction between this case and *Embassy* could be found in the nature of the benefits an employee might expect. Those differences, however, make this an even stronger case for denying priority. In *Embassy,* it was at least possible for an employee to secure short-term benefits from the plan, such as upon the occurrence of illness. Here, the principal benefits are long-term. Even when an early payment results, the second priority would not increase the payments, and thus could not enhance any "protective

cushion." The priority should therefore be denied here, as it was in *Embassy*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
HARRIS WEINSTEIN,
Assistant to the Solicitor General.
CROMBIE J. D. GARRETT,
KARL SCHMEIDLER,
HOWARD M. KOFF,
Attorneys.

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SUPREME COURT OF THE UNITED STATES

No. 616.—October Term, 1967.

Joint Industry Board of the Electrical Industry et al., Petitioners, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 20, 1968.]

Mr. Justice White delivered the opinion of the Court.

Section 64 (a)(2) of the Bankruptcy Act, 30 Stat. 544, 11 U. S. C. § 104 (a)(2), grants priority over the claims of other creditors to "wages . . . due to workmen, . . ." the priority being limited to $600 and to wages earned within three months before the commencement of the proceedings.[1] The question before us is whether priority under § 64 (a)(2) must be accorded to an employer's unpaid contributions to an employee's annuity plan established by a collective bargaining contract. The referee and the District Court denied the

[1] Section 64 (a), 30 Stat. 563 (as amended by Act of June 22, 1938, 52 Stat. 874, and Act of July 30, 1956, 70 Stat. 725), 11 U. S. C. § 104 (a), provides in relevant part:

"The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; and for the purposes of this clause, the term 'traveling or city salesman' shall include all such salesmen, whether or not they are independent contractors selling the products or services of the bankrupt on a commission basis, with or without a drawing account or formal contract . . ."

priority and the Court of Appeals affirmed. *In re A & S Electric Corp.*, 379 F. 2d 211 (C. A. 2d Cir. 1967). We granted certiorari, *sub nom. Joint Industry Board of the Electrical Industry* v. *United States*, 389 U. S. 969 (1967). We affirm the judgment.

The Annuity Plan of the Electrical Industry in New York City was established by a collective bargaining agreement between Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO, and four associations of electrical contractors. The plan covers all employees in the bargaining unit represented by the union and is funded by employer contributions of "Four Dollars ($4.00) per day for each day worked or each holiday for which payment is received by his employees . . . ." Payments are made to trustees who are empowered to collect and administer the contributions under the provisions of the plan. These trustees are the petitioners here. Contributions received by the trustees are credited to the account of the individual employees but are "payable to him only as hereinafter provided," namely, upon death, retirement from the industry at age 60, permanent disability, entry into the Armed Forces, or ceasing to be a participant under the plan. Death benefits are paid only out of income, if available, and other benefits, though they may be payable in installments, will at a minimum return to the employee the total of the contributions credited to his name, without interest.

A & S Electric Corporation, an employer liable for contributions to the annuity plan, was adjudicated a bankrupt in 1963. The Joint Industry Board filed a claim which included $5,114 representing payments under the plan which fell due but were unpaid during the three months prior to the commencement of the proceedings. Priority for this amount was asserted under § 64 (a)(2). The United States, with a fourth-class priority claim

for unpaid taxes, objected to the allowance of the Joint Board's priority claim. The referee and the courts agreed with the United States, holding that payments due to the Joint Board were not wages due to workmen, relying for this conclusion principally upon *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29 (1959).

We agree that *Embassy Restaurant* controls this case. There the claim was for unpaid employer contributions to a welfare fund, the contributions being $8 per month for each full-time employee; the fund provided life insurance, weekly sick benefits, hospital and surgical payments, and other advantages for covered employees. That claim, the Court held, was not entitled to § 64 (a)(2) priority because payments to such a welfare fund did not satisfy the manifest purpose of the priority, which was "to enable employees displaced by bankruptcy to secure, with some promptness, the money directly due to them in back wages, and thus to alleviate in some degree the hardship that unemployment usually brings to workers and their families." 359 U. S., at 32.[2] The contributions involved there were payable to trustees, not to employees, and were disbursable to employees only on the occurrence of certain events, not incuding the bankruptcy of the employer. Neither the contributions nor the plan provided any immediate support for workmen during the period of financial distress.

The case before us concerns employer contributions to the welfare fund which are similarly not due the employee and never were; they were payable only to the trustees, who had the exclusive right to hold and manage the fund. Though the contributions were credited to individual employee accounts, nothing was payable to employees except upon the occurrence of certain events.

[2] The cases in the lower courts are in agreement as to the purpose of § 64 (a)(2). See 3 Collier on Bankruptcy, ¶ 64.201, at 2112, nn. 7–9 and related text (14th ed., 1967).

Until death, retirement after age 60, permanent disability, entry into military service, or cessation of participation under the plan, no benefits were payable. Further, as the referee pointed out, the employee could not assign, pledge, or borrow against the contibutions, or otherwise use them as his own.[3] Quite obviously the annuity fund was not intended to relieve the distress of temporary unemployment, whether arising from the bankruptcy of the employer or for some other other. Hence, if *Embassy Restaurant* is to be followed, the unpaid contributions in this case do not satisfy the fundamental purpose of the § 64 (a)(2) priority for wages due to workmen.

Nor are we inclined to overrule *Embassy Restaurant*'s construction of § 64 (a)(2). This is a matter more appropriately left to the Congress, which has not infrequently given attention to § 64 (a) of the Bankruptcy Act and to the priorities it creates. The latest amendments to § 64 (a) occurred in 1966, in the Acts of July 5, 1966, 80 Stat. 268 and 80 Stat. 271. Although the section was completely re-enacted in 1967,[5] § 64 (a)(2), was left unchanged despite the fact that in every Congress since

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[3] The plan also provides that no person claiming by or through any participant shall have any right, title, or interest in or to the annuity fund. Section 9 (f) of the plan imposes additional limitations: "The benefits payable to Participants or beneficiaries under this Plan cannot be assigned and shall not be liable to attachment, garnishment or other process, and shall not be taken, appropriated or applied by any legal or equitable process, or by operation of law, to pay any debt or liability of the Participant or of any beneficiary or next-of-kin who may have a right thereunder, either before or after payment."

It seems agreed in this case that the employer contributions to the fund are not taxable to the employee at the time they are made, but only when later received as benefits.

[4] The history of § 64 (a)(2) is dealt with in both the majority and dissenting opinions in *United States* v. *Embassy Restaurant*, 359 U. S. 28 (1959). For a more complete consideration see 3 Collier on Bankruptcy, ¶¶ 64.01, 64.201 (14th ed. 1967).

[5] Act of November 28, 81 Stat. 511.

Embassy Restaurant bills have been introduced to overrule or modify the result reached in that case.[6]

Despite the general policy of the Bankruptcy Act to distribute assets of the estate equally to creditors, the priorities established in § 64 (a) give priority to wages due workmen up to $600 if earned within three months prior to bankruptcy. Other unpaid wages are allowable as general claims but are not entitled to priority. If delinquent contributions to welfare and annuity funds providing deferred benefits to employees were to have equal priority with wages payable directly to employees, the maximum payable immediately and directly to employees would be reduced whenever individual wage claims approached $600 or whenever the assets of the estate would not permit all wage claims to be paid in full. Also, increasing the amounts payable to second priority creditors would reduce the assets available for distribution to lower priority claimants and general creditors, including wage claimants not entitled to priority.[7] *Embassy Restaurant* was decided nine years ago. If there is still any question as to whether claims for unpaid contributions to provide deferred benefits to employees should share the assets of bankrupts with general creditors or should be entitled to the limited priority granted wages due to workmen, any new resolution of that question should come from Congress.

Affirmed.

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[6] H. R. 2076, 90th Cong., 1st Sess. (1967); H. R. 991, 89th Cong., 1st Sess. (1965); H. R. 11784, 88th Cong., 1st Sess. (1963); H. R. 66, 88th Cong., 1st Sess. (1963); H. R. 2274, 87th Cong., 1st Sess. (1961); and H. R. 9831, 86th Cong., 2d Sess. (1960).

[7] It is instructive that workmen's compensation claims were not provable in bankruptcy until 1934, when they were given a seventh priority. In 1938 the priority for compensation claims was abolished. Moreover, taxes and Social Security contributions which are withheld from wages are entitled to a fourth priority as taxes rather than a second priority as wages.

SUPREME COURT OF THE UNITED STATES

No. 616.—October Term, 1967.

Joint Industry Board of the Electrical Industry et al., Petitioners, *v.* United States.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 20, 1968.]

Mr. Justice Fortas, with whom The Chief Justice and Mr. Justice Brennan join, dissenting.

I do not agree that *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29 (1959), controls this case. I believe the employer's unpaid contributions to the employees' annuity plan are "wages . . . due to workmen" within § 64 (a)(2) of the Bankruptcy Act. Those contributions accrued and unpaid within three months before the commencement of the bankruptcy proceedings are entitled to the statutory priority.

In this case, the employees and the employer agreed, in a collective bargaining agreement, that the employer would compensate each employee with stipulated wages and, additionally, $4 per day "for each day worked or each holiday. . . ." The latter sum, instead of being paid directly to the employees, was remitted to trustees of an annuity plan. In the accounts of the plan, the sum remitted for each employee, and measured by his days of work, was credited to that employee. The employee was entitled to receive the sum credited to his account upon retirement from the industry at age 60, death, permanent disability, entrance into the Armed Forces, or ceasing to be a participant under the plan by leaving the electrical industry or by accepting employment with some electrical company that is not covered by the collective bargaining agreement.

It is unmistakably clear (1) that the sums in question were to be paid as part of the wage bargain between employer and employee; (2) that the sum due each employee was specifically related to and measured by his work; (3) that the sum which each employee earned was accounted for separately and individually; he was entitled to the amount paid to the trustee on account of his individual labor; and (4) that inevitably, as sure as death, there was to come a point of time when the sum remitted to the trustee on account of each individual's work would be paid to that individual or his heirs.

In my judgment, it is impossible to distinguish, on the basis of the purpose of the priority provisions of the Bankruptcy Act, between these payments to the annuity plan and direct payments to the employee for his days' labors. The Court, however, holds that payments to the plan do not satisfy the "manifest purpose of the priority," as that purpose was explained in *Embassy Restaurant*. This purpose, the Court says, was to enable employees, upon the bankruptcy of their employer, promptly to secure money directly due them in back wages and thereby to alleviate the hardship that unemployment brings. *Embassy Restaurant* demonstrates, the Court says, that since the contributions to the annuity plan were not immediately payable to the employees upon bankruptcy, they do not fall within the definition of "wages" for priority purposes.

But the present case is materially different from *Embassy Restaurant*. In that case, the employee was never entitled to receive the sums which were paid into the fund on account of his labor. These sums and the sums paid by the employer for all other employees were used to provide life insurance, sick benefits, hospital and surgical payments, and other benefits. An employee was never entitled to demand and receive payment of sums

that he had earned. These sums were not credited to him to be paid upon his death or retirement or other contingencies.

In a dissenting opinion in that case, MR. JUSTICE BLACK (joined by THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS) argued that the majority misconceived the nature of the payments into the fund in *Embassy Restaurant* and the purpose of the priority for wages. But we need not quarrel with the Court's conclusions in *Embassy Restaurant*, for purposes of the present case. Here, it is entirely clear that the sums paid and payable into the fund were payable to the individual employee. They were his. They were part of his wages. Only the time of receipt was deferred until retirement at age 60, separation from the industry, death, etc.

There is nothing whatever in § 64 to indicate, as the Court would have us believe, that "wages" lose their priority position if they are not immediately payable upon the event of bankruptcy. There is no basis whatever, except this Court's *ipse dixit* in this case, to say that the priority is available only to provide "*immediate* support for workmen during the period of financial distress." *Embassy Restaurant* is not authority for this. *Embassy Restaurant* is authority for the proposition that when the "wages" are never payable to the employee, but benefit him only through providing life insurance or various types of services, the priority is not applicable. That is not the present case.

I take it that the purpose of the "wages" priority—just as in the case of all other priorities—is to give a preferred status to claims deemed particularly meritorious, so that the chances that the claimant will recover the sums due him on such claims will be enhanced. "Wages . . . due to workmen" are in this category, as are other claims such as costs of administering the bank-

ruptcy estate and taxes owed to the United States or any State. The lower court cases which the majority claims are "in agreement" as to the purpose of the "wages" priority are probably not in agreement with each other at all and certainly not in agreement with the majority's restrictive definition of that purpose. *In Matter of Lawsam Electric Co., Inc.*, 300 Fed. 736 (D. C. N. Y.), Judge Learned Hand said: "The statute was intended to favor those who could not be expected to know anything of the credit of their employer but must accept a job as it comes, to whom the personal factor in employment is not a practicable consideration." *In Matter of Estey*, 6 F. Supp. 570 (D. C. N. Y.), it was said that "the intention of Congress was plainly to give special protection to a class of wage-earners who generally have no substantial savings or reserves to fall back on in case of adversity and therefore cannot afford to lose." Certainly neither of these statements, which the majority cites in support of its definition of the purpose of the "wages" priority, constitutes authority for the proposition that the priority was intended only to alleviate the hardship caused by unemployment following immediately upon the bankruptcy of an employer. As a matter of fact, recognizing the priority does not assure immediate payment. Payment is made upon interim or final distribution of the estate. Priority merely increases the prospects of recovery.*

*Even if I were to accept the majority's definition of the purpose of the "wages" priority, I still could not agree with the decision to affirm. For the majority indulges in a major, unexplained, assumption with which I do not agree: the majority assumes, without any basis that I can find in the record or anywhere else, that upon the bankruptcy of an employer an employee is likely to suffer the hardship of unemployment yet unlikely to suffer the hardship of accepting a job outside the electrical industry or with an employer who is not covered by the collective bargaining contract and annuity plan. Of course, if an employee does choose, upon the bank-

The Court's decision in this case, in my opinion, deprives the workers here concerned of the protection which Congress accorded their claims. We should reverse the judgment below.

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ruptcy of his employer, to seek work with an employer not covered by the contract, he ceases to participate in the annuity plan and may, under the terms of that plan, claim the monies that have accrued in his account. In this plausible and, I would suspect, common situation, the employee receives his annuity account "immediately" after the bankruptcy. I see no significant difference—and certainly the majority suggests none—between payments that may alleviate the hardship of unemployment caused by bankruptcy and payments that may alleviate the hardship of unattractive employment after a discharge caused by bankruptcy.